Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

DIAMOND JO CASINO,

Petitioner,

v.

DAWN RANNALS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether safety training programs conducted by a Department of the United States government at a government-owned and operated facility may be considered the "workplace" of a Jones Act plaintiff, and voluntary attendance at such programs deemed performance of the "operational activities" of a Jones Act employer, for purposes of judicially extending the realm of Jones Act liability to include injuries occurring in a land-based educational setting hundreds or thousands of miles from the employer's ship.

II. Whether a Department of the United States government may be deemed the agent of a Jones Act employer for purposes of imposing vicarious liability on the Jones Act employer for the acts of the Department where:

- the Department of the United States government was not fulfilling a legal obligation of the Jones Act employer at the time that the Department allegedly caused injury to the Jones Act plaintiff;

- the Jones Act employer had no right to control or supervise the conduct of the Department of the United States government; and

- the Department of the United States government did not commit any negligent act or omission but rather acted in full compliance with the law that governed it.

III. Whether liability may be imposed under the Jones Act absent any direct or imputed negligence by a seaman's employer?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Diamond Jo Casino states that it has no parent and no publicly-held company owns ten percent or more of its stock.

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Petitioner Diamond Jo Casino ("petitioner" or "Diamond Jo") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit, together with the dissenting opinion of Boggs, J., is reported at 265 F.3d 442. The opinion is reproduced in the appendix hereto ("App.") at 1a, and the dissenting opinion of Boggs, J., is reproduced at App. 19a. The opinion and order of the United States District Court for the Western District of Ohio is unreported; it is reproduced at App. 27a.

STATEMENT OF JURISDICTION

The Sixth Circuit's judgment was entered on September 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Jones Act, 46 U.S.C. App. § 688 provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States, modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right

> of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court in which the defendant employer resides or in which his principal office is located. [46 U.S.C. App. § 688]

INTRODUCTION

Like many private employers, vessel owners such as Diamond Jo have historically been willing to fully or partially subsidize the cost of attending outside educational programs for their employees in order to create a more educated, skilled and safety-conscious workforce. Selected educational programs may range from a one-hour seminar to a week-long training class to college-level course work, and may be held locally or at distant locations across the country.

In the maritime arena, two of the most significant providers of safety training programs for seamen are the United States Department of Transportation ("DOT") and the United States Coast Guard ("Coast Guard"). These federal entities are dedicated to "ensuring that our various modes of transportation operate safely on an individual basis and together as an interlinked system"[1] and to "preventing fires and saving lives on the water."[2] In order to fulfill their mission, the DOT and Coast Guard conduct numerous safety training courses across the nation, including twenty-four sessions of firefighting school per year at the DOT's Great Lakes Region Fire Training Center in Toledo, Ohio.[3]

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1. *See* www.dot.gov/safety.html

2. *See* www.uscg.mil/hq/g-m/mse4/mse4home.html

3. The DOT also conducts fire training courses at the Unites States Navy – Military Sealift Command (MSC)/MARAD fire (Cont'd)

At issue in this case is whether a marine employer that affords its seaman employees the opportunity to voluntarily attend such programs subjects itself to potential Jones Act liability for any injury sustained in connection with that attendance absent any direct or imputed negligence by the employer. In a split decision, the Sixth Circuit extended the Jones Act beyond all previously recognized boundaries in holding that a vessel owner can be held liable in such situations. As explained in Judge Boggs' dissent, the majority's holding conflicts with established admiralty law and ordinary tort principles:

> all of the relevant parties – omitting any mention of plaintiff Rannals – were acting non-negligently under any law of which they had notice. Under admiralty law, as well as ordinary tort principles, no liability should attach to the *M/V Diamond Jo.* (App. 19a)

Supreme Court review is warranted to correct this error and allay the concern of thousands of vessel owners nationwide that subsidizing seamen's attendance at safety programs now increases rather than mitigates their risk of loss and damages.

(Cont'd)
training facility in Earle, New Jersey and the United States Navy fire training installation in San Diego, California. *See* www.marad.dot.gov/programs/sup_safety.html. Information regarding some of the many federally and state-sponsored maritime educational and safety training programs, including the DOT firefighting school involved in this case, is compiled in the Lodging filed with this Petition.

STATEMENT OF THE CASE

A. Rannals' Employment At Diamond Jo Casino In Dubuque, Iowa

Respondent Dawn Rannals ("Rannals") was employed by Diamond Jo as a deckhand on its riverboat casino in Dubuque, Iowa. Rannals' job duties included deck maintenance, monitoring the decks for fires or other emergencies, assisting housekeepers, and doing errands for the mate or captain. Rannals started with Diamond Jo in August of 1997 and received supervised on-the-job training as to her general job duties and responsibilities in case of fire, "man overboard", dock side evacuations and medical emergencies that might occur on the boat.

B. The DOT's Fire Training School In Toledo, Ohio

The United Stated Department of Transportation ("DOT") conducts week-long firefighting training programs ("firefighting school") at the Great Lakes Region Fire Training Center ("Training Center") in Toledo, Ohio. The DOT owns and operates the Training Center premises, which include a service building housing a large classroom facility; an attached garage holding firefighting equipment; a large cement model of a ship where firefighting exercises take place; a cement driveway; and a parking area consisting of a small cement surface and grass areas. Many of the students who attend the DOT firefighting school in Toledo are employed aboard vessels (e.g. riverboat casinos, barges, ships) and qualify as Jones Act "seamen".

C. Rannals' Voluntary Attendance At Firefighting School

Employees working in the Marine Department at Diamond Jo are eligible to attend the firefighting school in Toledo on a voluntary basis. Any employee who volunteers to attend

firefighting school is paid his/her regular rate of pay while enrolled in the training program, together with reasonable transportation, lodging and food expenses. Deckhands are not required to attend firefighting school as a condition of their employment; however, the training is a prerequisite for promotion to some supervisory positions within the company.

Since 1996, thirty-three Diamond Jo employees have voluntarily attended firefighting school at the Training Center in Toledo. No one ever complained of any unsafe condition at the Training Center. On the contrary, those who attended firefighting school spoke highly of the program and were impressed with both the education they received and the high safety standards observed by everyone connected with the program.

Rannals, who learned about the firefighting school from speaking with other Diamond Jo deckhands and mates, wanted to participate and volunteered to attend firefighting school from January 12-16, 1998.

D. Rannals' Slip And Fall On A Natural Accumulation Of Ice At The Training Center

Rannals traveled approximately 400 miles from Dubuque, Iowa to the Training Center in Toledo, Ohio with three other Diamond Jo deckhands. Rannals and the other Diamond Jo deckhands participated in the firefighting program at the Training Center from Monday, January 12, 1998 through the end of classes on Thursday, January 15, 1998, without incident.

On Thursday morning, Rannals saw that it was "icy outside" as she and the other deckhands left their hotel to drive to the Training Center. Rannals had to be careful stepping off the curb to get into their car, and noted that the hotel driveway was "kind of icy" and that the roads going to the school were "slippery".

When Rannals arrived at the Training Center at around 8:30 or 9:00 a.m., she observed that the cement driveway and grass at the school were "a little snowy or icy."[4]

When firefighting class ended at proximately 4:00 p.m. that day, Rannals and the other three Diamond Jo employees left the Training Center building and walked down the driveway toward the area where they had parked their car. Several program participants had parked their cars in the grassy parking area in front of the Training Center. Rannals walked onto the grassy parking area to have a personal discussion with another student about getting together that evening. At that time, there was ice or frost on the grass. After Rannals finished talking to the other student, she turned to walk toward her car, which one of the other Diamond Jo deckhands had driven up the driveway to the area where Rannals was standing. When Rannals stepped off the grass onto the cement driveway, she slipped on a thin layer of ice or frost and fractured her ankle. At no time prior to her accident did Rannals or any of the other deckhands ever tell anyone at Diamond Jo that there was any unsafe condition on the Training Center premises or that there was a small accumulation of ice there.

E. Rannals Sues Diamond Jo

Rannals filed suit against Diamond Jo, asserting a negligence claim under the Jones Act (46 U.S.C. App. § 688) based upon Diamond Jo's alleged failure to provide her a safe

4. There was no precipitation recorded in Toledo on Wednesday, January 14, 1998. Between 1:00 and 3:00 a.m. on Thursday, January 15, 1998, 0.11 of an inch of precipitation was recorded at Toledo Express Airport. An additional 0.04 of an inch of precipitation fell between 6:00 and 7:00 a.m. and "trace" precipitation was noted between 4:00 and 5:00 a.m. and 8:00 and 9:00 a.m. that day. The temperature on the morning of January 15, 1998 was below freezing and remained so throughout the day.

place to work, as well as claims for unseaworthiness, maintenance, cure and wages under general maritime law. Rannals subsequently abandoned her unseaworthiness claim and Diamond Jo satisfied its maintenance and cure obligations by paying all of Rannals' medical expenses and making payments for her living expenses for each day she was unable to work on account of her injuries.

F. The District Court Judgment

Diamond Jo moved for summary judgment on Rannals' Jones Act claim as the undisputed facts failed to establish any negligence on the part of Diamond Jo in failing to discover and remove a small natural accumulation of ice on the Training Center premises owned and operated by the DOT.[5] The district court granted Diamond Jo's motion, holding that "no reasonable jury could find that Defendant was negligent in failing to discover the ice in the Training Center parking lot." App. 37a.

G. A Split Decision On Appeal

In a split decision, a panel of the Sixth Circuit reversed the judgment of the district court, holding that the lower court had

> erred in determining that Rannals failed to create a genuine issue of material fact regarding whether her injuries were caused, in whole or in part, by Diamond Jo or its agents' failure to cure or eliminate an unreasonably dangerous condition in her workplace about which Diamond Jo or its agents knew or should have known. (App. 6a.)

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5. For purposes of its summary judgment motion only, Diamond Jo did not dispute that Rannals was "in the course of her employment" while at the Training Center.

The majority held that the Training Center constituted Rannals' "workplace" and that Diamond Jo had a contractual relationship with the DOT's Training Center which made the Training Center an agent of Diamond Jo and exposed Diamond Jo to liability for any negligence by the DOT in maintaining the Training Center premises. App. 10a-15a. The majority did not explain how the DOT, a Department of the United States government over which Diamond Jo had no authority or control, could be deemed the "agent" of a private business entity and failed to cite any authority supporting this novel theory.

Circuit Judge Boggs dissented. App. 19a-26a. Judge Boggs criticized the majority's apparent willingness to impose Jones Act liability in the absence of any direct or imputed negligence, App. at 19a, 26a, and refuted its conclusions with respect to both the "workplace" and agency issues. Noting that a Jones Act employer "is not an absolute insurer for everything that may happen to an employee off of the employer's premises", Judge Boggs pointed out that except for performance of "operational activities", the employer's duty to provide a reasonably safe place to work "does not reach further than the ship, the employee's usual location of work, and the means of egress and ingress to those locations." App. 20a. Judge Boggs rejected the majority's view that any location an employee visits in the course of employment constitutes his or her "workplace" – regardless of its nature, function or distance from the ship – and declared that it would be particularly unreasonable to construe the Training Center as a "workplace" when Rannals was not even required to attend the firefighting school as part of her employment duties. App. 20a. As Judge Boggs explained:

> if payment of tuition can establish the individual is working at a workplace, then a college or maritime

> academy where the employee is sent (or, apparently, *chooses* to go), would also create liability for the employer. (App. at 23a-24a; italics in original)

Judge Boggs likewise rejected the majority's pronouncement that Diamond Jo's "contractual relationship" with the Training Center (i.e. arranging and paying for its employees to attend the firefighting school) rendered the federal DOT an agent of Diamond Jo, App. at 12a-14a:

> The Department of Transportation is not the agent of Diamond Jo Casino. "The law of agency is fully applicable in admiralty." 1 ADMIRALTY § 5-2, at 175. As the court is fully aware, the mere fact that a contract exists between two parties does not make one the agent of the other. And although an employer *may* be liable for the negligence of its independent contractor under the Jones Act, it has never been suggested that the mere existence of a contractual relationship with the employer *mandates* indirect liability. The DOT provided a service to Rannals, subsidized in her case by Diamond Jo, but did not thereby become Diamond Jo's agent (or that of any of the other similarly situated shipowners), because it was not performing any duties or operations of the vessel. *Sinkler* and its progeny do not allow an agency to be created where neither party had the intent to create one. (App. at 23a; italics in original)

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S UNPRECEDENTED OPINION JUDICIALLY EXTENDS THE JONES ACT TO IMPOSE LIABILITY WHERE THERE IS NO DIRECT OR IMPUTED NEGLIGENCE BY THE EMPLOYER — IMPERMISSIBLY CONVERTING THE ACT INTO A WORKER'S COMPENSATION STATUTE AND RENDERING THE EMPLOYER AN ABSOLUTE INSURER AGAINST INJURY.

The Jones Act, 46 U.S.C. § 688, was passed in 1920 to grant a seaman a cause of action against his employer for negligence.[6] Despite the statute's liberal construction, proof of negligence has remained "essential to recovery under the Jones Act." 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6-21 (3d ed. 2001); *Jacob v. New York City*, 315 U.S. 752, 755 (1942); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 681 (10th Cir. 1981); *Perkins v. American Electric Power Fuel Supply, Inc.*, 246 F.3d 593, 598 (6th Cir. 2001). Whether an employer is negligent is determined under standard negligence principles of "ordinary prudence"/reasonable care. *Gautreux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (en banc). An employer "must have notice and the opportunity to correct an unsafe condition before liability will attach." *Id.* at 593 (citing *Havens v. F/T Polar Mist*, 996 F.2d 215, 218 (9th Cir. 1993)). The mere fact that an injury occurred does not give rise to a Jones Act claim. *Gaddis v. Orgulf Transport Co.*,

6. Under the Jones Act, seamen are afforded rights parallel to those of railroad employees under the Federal Employers' Liability Act ("FELA"). 46 U.S.C. App. § 688. Section 51 of FELA provides in pertinent part that "[e]very common carrier by railroad . . . shall be liable in damages . . . for such injury or death resulting in whole or in part from the *negligence of any of the officers, agents or employees of such carriers*." 45 U.S.C. § 51 (emphasis supplied).

680 F. Supp. 1279, 1284 (S.D. Ill. 1988); *Pittsburgh S.S. Co. v. Palo*, 64 F.2d 198, 200 (6th Cir. 1933) ("The shipowner is not an insurer of the safety of his seamen, and the burden of establishing negligence rests upon plaintiff.").

As observed in Judge Boggs' dissent, the decision below "allows recovery *where no party has been negligent* under the law as it could be known to them", App. 26a (emphasis in original), thereby converting the Jones Act from the fault-based liability statute enacted by Congress to a judicially created worker's compensation-type vehicle for recovering damages upon the mere occurrence of injury. This the Sixth Circuit cannot do – courts are not free to rewrite the laws of Congress even to further legitimate policy interests. *Dooley v. Korean Airlines Co., Ltd.*, 524 U.S. 116, 122-23 (1998). Justice Goldberg's dissenting opinion (joined by Justices Harlan and Stewart) in *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1, 11-15 (1963) (FELA), underscores the point:

> It is my view that, as a matter of policy, employees such as the petitioner, who are injured in the course of their employment, should be entitled to prompt and adequate compensation regardless of the employer's negligence and free from traditional common-law rules limiting recovery. But Congress has elected a different test of liability which, until changed, courts are obligated to apply. (374 U.S. at 15)

The absence of any negligence by or imputable to Diamond Jo in allegedly failing to provide Rannals a "safe place to work" is undisputed. Foremost, the presence of a small amount of ice on the Training Center's driveway following 0.15 inches of precipitation earlier in the day (January 15th) did not render the premises unreasonably dangerous. *Missouri Pacific R.R. Co. v.*

Aeby, 275 U.S. 426 (1928) (FELA); *Raudenbush v. Baltimore & Ohio R.R. Co.*, 160 F.2d 363 (3d Cir. 1947) (FELA). Like Rannals, the injured employee in *Missouri Pacific* charged her employer with negligence in failing to remove snow and ice in her workplace (a train station platform) following earlier rain and snow. *Id.* at 427. This Court found no negligence, observing that the employer was not "an insurer of respondent's safety" and was not required to make the place "absolutely safe" but only to use reasonable care under the circumstances:

> The petitioner was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition. . . . No employment is free from danger. Fault or negligence on the part of the petitioner may not be inferred from the mere fact that respondent fell and was hurt. She knew that it had rained and that the place was covered with ice and snow. Her knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the petitioner. Petitioner was not required to give her warning. . . . It is a matter of common knowledge that almost everywhere there are to be found in public ways and on private grounds numerous places in general use by pedestrians that in similar weather are not materially unlike the place where respondent fell. *Under the circumstances, it cannot reasonably be held that failure of petitioner to remove the snow and ice violated any duty owed to her.* (*Id.* at 430; citations omitted; emphasis supplied)

Accord, *Raudenbush*, 160 F.3d at 367 (railroad had no duty to remove "light fall of snow" from area of deceased's employment).

Missouri Pacific is applicable here and defeats any claim of direct or imputed negligence by Diamond Jo. Indeed, the district court's opinion granting summary judgment for Diamond Jo echoed the very reasoning expressed by this Court in *Missouri Pacific*:

> . . . Plaintiff's claim must fail on the facts before the Court. She has made no showing of any unusual condition, above and beyond the mere existence of the patch of ice, that could give rise to a finding of negligence. She does not claim that the patch of ice was hidden or was otherwise imperceptible to her. She does not claim that the walkway was obstructed, or that she could not easily have avoided the patch of ice by simply stepping a few inches to the side in either direction; indeed, it appears from the record evidence that the grass walkway and parking lot were otherwise relatively clear, albeit slippery, at the time of Plaintiff's fall. *On these facts, there is not a jurisdiction in the country that would allow Plaintiff's negligence claim to go forward under a theory of either direct or imputed negligence on the basis of the Training Center's failure to remove the ice.* (App. 36a; emphasis supplied)

Furthermore, even if the ice patch could be deemed an unreasonably dangerous condition, Diamond Jo was not negligent in failing to discover and correct the condition prior to Rannals' fall. There is no direct negligence because Diamond Jo did not have actual or constructive notice of this recent, temporary condition hundreds of miles from its ship. App. 10a, 22a. There is no imputed negligence by the DOT Training Center because the DOT was not required to remove

natural accumulations of ice on its premises under Ohio law.[7] *Contrast, Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 331 (1958) (*negligence* of third-party's switching crew imputed to employer); *Hopson v. Texaco, Inc.*, 383 U.S. 262, 264 (1966) (taxi driver's *negligence* in transporting ill seaman imputed to shipowner).

II. THE OPINION BELOW REPRESENTS A RADICAL AND UNWARRANTED DEPARTURE FROM WELL-ESTABLISHED PRINCIPLES OF MARITIME AND AGENCY LAW.

A. Payment Of A Seaman's Wages, Tuition And Expenses By A Jones Act Employer Does Not Convert Educational Institutions Into A Seaman's "Workplace" Or Render Classes The "Operational Activities" Of A Ship.

The Sixth Circuit's holding that the DOT's Training Center became Rannals' "workplace" when she voluntarily attended firefighting school there at company expense and that her voluntary participation in the program was part of the "operational activities" of the vessel, App. 10a-14a, is one of first impression – and of great importance to the maritime community, which routinely subsidizes attendance for thousands of Jones Act seamen at similar educational and safety programs

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7. *See* App. 17a, n.6:

> We recognize that a direct negligence claim against the managers or supervisors at the training center who failed to cure or eliminate the allegedly dangerous, icy conditions would be governed by the Federal Tort Claims Act, 28 U.S.C. § 1346 (b), which requires application of state law to tort claims brought against the United States Government (in this case, Ohio law), because the training center was managed and run by the United States Department of Transportation.

every year. Unfortunately, the Sixth Circuit has erroneously extended the contours of a seaman's "workplace" and the "operational activities" of a ship beyond all previously defined and reasonably conceived boundaries, without regard for precedent or practicality.

This Court's pertinent Jones Act and FELA precedent makes plain that for purposes of assessing the employer's duty to provide a safe place to work, the employee's "workplace" extends no further than the employer's actual premises (together with reasonable areas of ingress and egress) and third-party premises where the employer directs the employee to perform customary work duties. *See, e.g., O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 38 (1943) (seaman ordered to go ashore to assist in repairing gasket used to unload ship's cargo); *Braen v. Pfeifer Oil Transp. Co.*, 361 U.S. 129, 131-33 (1959) (seaman ordered to do carpentry work on raft used in chipping, painting and welding employer's vessels); *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1 (1963) (railroad employee directed to load mail into car owned by another railroad).

The Training Center does not fall within these limited spheres. The Training Center is a government-owned facility located 400 miles from Diamond Jo's actual premises, and Diamond Jo never ordered or required Rannals to go there to perform her normal work duties. Rannals' participation in the firefighting program was completely voluntary and was undertaken to augment her safety skills, not as a job duty or condition of her continued employment. Thus, the Training Center cannot be deemed Rannals' "workplace" for purposes of imposing liability under the Jones Act.

The Sixth Circuit's interpretation of "operational activities" also conflicts with existing Supreme Court precedent. *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966) (Jones Act); *Sinkler v.*

Missouri Pacific Railroad Co., 356 U.S. 326 (1958) (FELA); *Ward v. Atlantic Coast Line R. Co.*, 362 U.S. 396 (1960) (FELA). These cases make plain that the "operational activities" of a Jones Act or FELA employer are those activities which must be performed: (1) to carry out the employer's business functions or "enterprise"; and/or (2) to fulfill a legal obligation or duty owed by the employer. *Id.* Voluntary attendance at the DOT's firefighting school does not fall within either category and thus cannot be deemed an "operational activity" of Diamond Jo.

Sinkler and *Hopson* highlight the point. In *Sinkler*, a FELA case, this Court opined that the defendant Missouri Pacific Railroad could be held liable to its employee for injuries caused by the negligence of an independent corporation in performing switching operations in the Houston terminal area because switching "is a vital operational activity of railroading consisting in the breaking up and assembly of trains and the handling of cars in interchange with other carriers", 356 U.S. at 327, is "necessary" to its business, *Id.* at 331, and "further[s] the task of the respondent's enterprise." *Id.* In so holding, the Court recognized that FELA views railroading as a "unitary enterprise" whose economic resources are "obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor." *Id.* at 330. The Court explained:

> While engaged in switching and handling respondent [Missouri Pacific]'s cars and trains about the terminal area, the Belt Railway employees on the job were, for purposes of the FELA, as much a part of the respondent's total enterprise as was the petitioner while engaged in

> his regular work on the respondent's car. (*Id.* at 331; bracketed material supplied)

Contrast, Ward v. Atlantic Coast Line R. Co., 362 U.S. at 397-98 (railroad employee working on privately owned siding servicing private owner alone was not performing "operational activities" necessary to carry out the employer's franchise).

There is no such "unitary enterprise" between Diamond Jo's riverboat casino business and the DOT's firefighting school; nor can attendance at the program be deemed a "vital" or "necessary" aspect of Diamond Jo's business where such attendance was not required by Diamond Jo but rather completely voluntary on Rannals' part.

Following *Sinkler,* this Court held in *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966), that a shipowner's discharge of a legal duty owed its employees (such as transportation of ill seamen in a foreign port to the United States Consul) is an "operational activity" of the ship for which off-premises liability may be imposed. *Id.* at 264. The Court stated:

> These seamen were in the service of the ship and the ill-fated journey to Port of Spain *was a vital part of the ship's total operations. The ship could not sail with these two men, nor could it lawfully discharge them without taking them to the United States consul.* Indeed, to have abandoned them would have breached the statutory duty to arrange for their return to the United States. (*Id.* at 264; emphasis supplied)

Here, there is no legal duty to send seamen to firefighting school, and thus no "operational activity" of Diamond Jo or any other shipowner being performed at the DOT Training Center.

B. The United States Department Of Transportation Is Not The Agent Of A Jones Act Employer Whose Employees Attend DOT Programs At Company Expense.

The Sixth Circuit's holding that the DOT Training Center is Diamond Jo's agent for purposes of imputing negligence under the Jones Act, App. 12a-14a, is likewise untenable. To Petitioner's knowledge, no other court has ever held that a Department of the United States government can be deemed the agent of a private business owner in carrying out its governmental functions. The reason for this dearth of case law is obvious: governmental entities are not authorized to act as agents for private business interests and no private business entity can exercise the control over a governmental entity necessary to create an agency relationship. Restatement (Second) of Agency § 1(1) (1958) (agency relationship "results from the manifestation of consent by one person to another person that the other shall act on his behalf and subject to his control, and consent by the other to so act.") The Sixth Circuit's opinion ignores this fundamental point.

Assuming, *arguendo*, that the DOT's government status did not preclude it from acting as an agent for private businesses, there is still no legal basis for finding an agency relationship between the DOT and Diamond Jo. The mere payment of tuition does not render an educational institution the "agent" of those who attend (or their employer sponsors). *Hanson v. Kynast*, 494 N.E.2d 1091, 1094-95 (Ohio 1986). The Sixth Circuit's reliance on the *Sinkler/Hopson* line of cases is likewise misplaced. Those opinions stand for the proposition that a third party retained to perform the legal duties of a Jones Act/FELA employer, or upon whose premises the "operational activities" of the employer are carried out, qualifies as the employer's agent for purposes of imputing the third-party's negligence to the employer, who cannot avoid liability by "outsourcing"

mandatory functions. As Judge Boggs aptly notes, these cases are "fully distinguishable" from that at bar because they involve "third parties performing the 'operational activities' of the ship, a term of art under FELA and the Jones Act.[8] App. 19a. There is no legal duty to send deckhands such as Rannals to firefighting school. As firefighting school is neither a mandatory legal obligation nor an "operational activity" of Diamond Jo, it does not render the DOT Diamond Jo's agent under *Sinkler/Hopson*.

III. THE DECISION BELOW WILL HAVE A CHILLING EFFECT ON THE WILLINGNESS OF JONES ACT EMPLOYERS TO SPONSOR EMPLOYEE ATTENDANCE AT CRITICAL SAFETY AND OTHER EDUCATIONAL PROGRAMS.

The Sixth Circuit's holding that sponsoring a seaman's attendance at a safety training or other educational program is sufficient to impose Jones Act liability for non-negligent conduct occurring hundreds or thousands of miles from ship will discourage shipowners from providing these critical educational opportunities. For what reasonable shipowner can be expected to continuously monitor weather or other conditions at educational facilities in far-away states to determine whether any of its employees might encounter an ambient hazard such as a natural accumulation of ice in the middle of winter? The absurdity of imposing – and impossibility of satisfying – such an onerous burden is obvious; even the Sixth Circuit majority "recognize[d] the difficulty that Diamond Jo, a riverboat casino business operating in Iowa, faces in monitoring the safety of its employees who are attending a seminar out of state in Ohio". App. 14a.

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8. *Citing* Thomas J. Schoenbaum, 1 *Admiralty and Maritime Law* § 6-21 (3d ed. 2001).

Absent any realistic means of ameliorating potential hazards at independent private or government-owned educational facilities (which clearly are not within the shipowner's supervision and control), the shipowner is forced into the role of absolute insurer of the safety of any seaman it sponsors to attend an educational program. The anticipated, and arguably most prudent course for shipowners facing this dilemma, is to simply stop sending seamen to such programs. Yet the ultimate cost of foregoing critical educational opportunities for seamen, both in terms of safety and productivity, may be far higher. The terrible irony of the Sixth Circuit's decision punishing Diamond Jo "in the name of safety for subsidizing the safety training of its employees" is underscored in Judge Boggs' dissent:

> Apparently, if Diamond Jo had given Dawn Rannals no wages during her week in Toledo and refused to pay her tuition or travel expenses, the court would not hold Diamond Jo liable for this accident. The court punishes Diamond Jo in the name of safety for subsidizing the safety training of its employees and for its investment in the greater safety of the vessel and the employee's fellow seamen. (App. 25a)

This Court can and should resolve this counterproductive, "catch-22" situation by granting review and reversing the decision below.

CONCLUSION

The Jones Act is intended to foster – not frustrate – increased safety for seamen. The Sixth Circuit's opinion below is contrary to the intent of the Act, existing Supreme Court precedent defining the appropriate boundaries for imposing liability under the Act, fundamental principles of maritime and agency law, and common sense, which all dictate against adoption of the geographically unlimited burden imposed upon shipowners here. For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED, DECIDED AND FILED SEPTEMBER 12, 2001

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99-4267

DAWN RANNALS,

Plaintiff-Appellant,

v.

DIAMOND JO CASINO,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Ohio at Toledo. No. 98-07545 — David A. Katz, District Judge.

Argued: January 26, 2001

Decided and Filed: September 12, 2001

Before: BOGGS and MOORE, Circuit Judges; BELL, Chief District Judge.*

* * *

* The Honorable Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

Appendix A

MOORE, J., delivered the opinion of the court, in which BELL, D. J., joined. BOGGS, J. (pp. 16-21), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant, Dawn Rannals ("Rannals"), filed this lawsuit against her employer, Defendant Appellee, Diamond Jo Casino ("Diamond Jo"), asserting a claim under the Jones Act, 46 U.S.C. § 688, based upon an injury she suffered while attending a firefighting training program in Toledo, Ohio.[1] The district court granted summary judgment in favor of Diamond Jo on Rannals's Jones Act claim, holding that Rannals had failed to create a genuine issue of material fact regarding whether her injuries were caused by an unreasonably dangerous condition in her workplace about which Diamond Jo or its agents knew or should have known.

Rannals now appeals the district court's decision. For the reasons that follow, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion.

I. FACTS

Rannals works as a deckhand for Diamond Jo, a riverboat casino operating in Dubuque, Iowa. On January 11, 1998,

1. Rannals also alleged liability for unseaworthiness, maintenance, cure, and wages under general maritime law. Rannals later abandoned her unseaworthiness claim, however, and she and Diamond Jo agreed to resolve any outstanding maintenance and cure issues between them.

Appendix A

Rannals and three other employees of Diamond Jo drove to Toledo, Ohio in a rental car provided by Diamond Jo so that they could attend a training program for firefighting from January 12-16, 1998, at the Great Lakes Region Training Center ("the training center"), which is operated by the United States Department of Transportation. Since 1996, Diamond Jo had allowed its employees to sign-up for this week-long training program and would pay its employees their regular rate of pay for the duration of the program. Additionally, Diamond Jo paid its employees' tuition costs for the program and all reasonable expenses for transportation, lodging, and food.[2] Diamond Jo did not require Rannals or any other employees to attend this training program; however, it did require completion of the program for promotions to supervisory positions, such as the lead deckhand positions.

After attending several days of classes at the training center, Rannals and her co-employees left their hotel to drive to the training center on the morning of Thursday, January 15, 1998. In her deposition, Rannals testified that, before she and her co-workers drove off that morning, some of her co-workers had to scrape ice off their rental car's windows. Rannals also stated that it was cold and drizzling on the morning of January 15, 1998, and that because of slippery and icy road conditions, she and her co-workers more cautiously drove to the training center. According to Rannals, when she and her co-workers arrived at the training center at

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2. If an employee did not pass the training course, resigned, or was terminated from Diamond Jo less than one year after completing the training program, however, that employee had to reimburse Diamond Jo for all tuition costs and expenses for transportation, lodging, and food. J.A. at 148.

approximately 8:30 a.m., it was "kind of icy on the driveway" of the training center and the surrounding grassy areas. J.A. at 81.

Data prepared by the National Oceanic and Atmospheric Administration regarding the weather conditions in Toledo, Ohio, on January 15, 1998 corroborated Rannals's observations, confirming that freezing rain and trace precipitation fell between the hours of 1:00 a.m. and 9:00 a.m. on January 15, 1998 and at no other time during that day and that it was misty between the hours of 1:00 a.m. and 5:00 p.m. on January 15, 1998. The data also showed that it was below thirty degrees Fahrenheit on January 15, 1998. Joint Appendix ("J.A.") at 152-59.

Once classes ended at approximately 4:00 p.m. on January 15, 1998, Rannals and her co-workers walked out onto a grassy area bordering one of the driveways of the training center to make plans for the evening with other program attendees. Rannals testified that the conditions on the training center's property at that time were "generally the same as when [she and her co-workers] had arrived at the school that morning."[3] J.A. at 94. After Rannals finished discussing evening plans with the other program attendees, she turned around to walk toward her group's rental car. According to Rannals, as Rannals stepped off the grass and onto the training center's driveway, she slipped on a patch of ice, fell, and fractured her ankle. Rannals testified that, after she slipped, she remembered seeing "a thin layer [of

3. Rannals also stated that such conditions had not changed by lunchtime, asserting "I think it was pretty much as it was that morning. I do not think anything really changed." J.A. at 82.

ice] . . . where [she] fell." J.A. at 92. Prior to Rannals's accident, no employee at Diamond Jo, including Rannals, had complained to Diamond Jo about unsafe conditions at the training center, nor had any supervisor from Diamond Jo observed any unsafe conditions at the center.

II. ANALYSIS

Rannals argues that the district court erred in granting summary judgment because it erroneously applied the defense of natural accumulation, a common-law defense under Ohio law, to her federal Jones Act negligence claim. Rannals contends that, as a result of applying the defense of natural accumulation, the district court erred in concluding that she had failed to create a genuine issue of material fact regarding whether Diamond Jo or its agents were negligent in failing to remove alleged dangerous conditions caused by ice in the training center's driveways.

We review de novo a district court's order granting summary judgment. *See Richardson v. Township of Brady*, 218 F.3d 508, 512 (6th Cir. 2000). On review of a district court's grant of summary judgment, we analyze the evidence and draw all reasonable inferences therefrom in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In particular, when we review a grant of summary judgment involving claims under the Jones Act, we are mindful of the " 'policy of providing an expansive remedy for seamen' " who are injured while acting in the course of their employment and recognize that the " 'submission of Jones Act claims to a jury requires a very low evidentiary threshold.' " *Daughenbaugh v.*

Bethlehem Steel Corp., Great Lakes Steamship Div., 891 F.2d 1199, 1205 (6th Cir. 1989) (quotation omitted); *see also Perkins v. American Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 598 (6th Cir. 2001). We affirm a grant of summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

After careful review, we conclude that the district court erred in determining that Rannals failed to create a genuine issue of material fact regarding whether her injuries were caused, in whole or part, by Diamond Jo or its agents' failure to cure or eliminate an unreasonably dangerous condition in her workplace about which Diamond Jo or its agents knew or should have known. The Jones Act provides a cause of action in negligence for "[a]ny seaman" injured "in the course of [her] employment." 46 U.S.C. App. § 688(a); *see also Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). Workers who satisfy the definition of seaman under the Jones Act "may recover under the Jones Act whenever they are injured in the service of a vessel, regardless of whether the injury occurs on or off the ship." *Chandris*, 515 U.S. at 360; *see also Daughenbaugh*, 891 F.2d at 1203. "Proof of negligence (duty and breach) is essential to recovery under the Jones Act," and an employer's conduct in a Jones Act case is reviewed "under the 'ordinary prudence' standard normally applicable in negligence cases." *Perkins*, 246 F.3d at 598 (citing *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997)). Once a plaintiff proves an employer's negligence, however, she need only show that

her "employer's negligence is the cause, in whole or part, of [her] injuries." *Id.* In other words, once negligence is established, the plaintiff need only show that her employer's negligence "played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957); *see also Perkins*, 246 F.3d at 598.

Furthermore, as the Supreme Court noted in *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939), the Jones Act was intended to expand — not limit — protections for seamen, and usually disallows "the application of rules of the common law which would affect [seamen] harshly." *Id.* at 431; *see also Daughenbaugh*, 891 F.2d at 1204 (holding that the Jones Act " 'is entitled to a liberal construction to accomplish its beneficent purposes' ") (quotation omitted). In other words, in Jones Act cases, an "employer is [generally] stripped of [its] common-law defenses." *Rogers*, 352 U.S. at 507-08. For example, while the doctrine of comparative negligence is applicable to claims under the Jones Act, the assumption of risk doctrine may not be used as a defense to such claims. *Chesapeake & Ohio Ry. Co. v. Newman*, 243 F.2d 804, 807 (6th Cir. 1957); *see also Socony-Vacuum Oil Co.*, 305 U.S. at 429-31.

Moreover, the Jones Act "incorporates the standards of the Federal Employers' Liability Act ["FELA"] . . . which renders an employer liable for the injuries negligently inflicted on its employees by its officers, agents, or employees." *Hopson v. Texaco, Inc.*, 383 U.S. 262, 263 (1966) (internal quotations omitted); *Perkins*, 246 F.3d at 598; *Daughenbaugh*, 891 F.2d at 1204; *see also Epling v. M.T.*

Epling Co., 435 F.2d 732, 736 (6th Cir. 1970), *cert. denied sub nom. Fahrig v. Young*, 401 U.S. 979 (1971). Under the FELA, an employer has a non-delegable duty to provide a safe workplace for its employees. *Payne v. Baltimore & Ohio R.R. Co.*, 309 F.2d 546, 549 (6th Cir. 1962), *cert. denied*, 374 U.S. 827 (1963).

In sum, to survive summary judgment in this action, Rannals had to create a genuine issue of material fact regarding whether (1) she was a seaman; (2) she was acting in the course of her employment at the time she suffered her injury; and (3) Diamond Jo or its agents played any part in causing Rannals's injury. Because the parties do not dispute that Rannals is a seaman, we need only address whether Rannals was acting in the course of her employment at the time of her injury and whether the negligence of Diamond Jo or its agents "played any part, however slight, in producing" Rannals's injury. *Perkins*, 246 F.3d at 598.

A. Course of Employment

As the district court suggested, we believe that Rannals established a genuine issue of material fact regarding whether she was acting in the course of her employment when she was walking toward her car at the training center on January 15, 1998. Although Rannals and her co-workers were not required to attend the training program in Toledo, we believe that their attendance and participation were in furtherance and to the benefit of Diamond Jo's business. *See, e.g.*, *Daughenbaugh*, 891 F.2d at 1206 (holding that a seaman was "on [his employer's] business while returning from shore leave, because shore leave for the crew is beneficial and

necessary to [the employer's] continued operation"); *see also Braen v. Pfeifer Oil Transp. Co.*, 361 U.S. 129, 132 (1959) (holding that employer may be liable for seaman's injuries where that seaman has been sent off ship to perform duties in furtherance of the employer's business). In fact, as Rannals asserted in her deposition, deckhands at Diamond Jo could not advance into supervisory positions, such as the lead deckhand positions, without such training. Additionally, as Rannals asserted, the deckhands at Diamond Jo were encouraged to attend such training by current mates who had previously attended the program. As this circuit has recognized, "[i]t would violate the notions of fair play for [an employer] to encourage its employees to [perform a particular activity away from its premises] and then escape liability for injuries suffered by its workers as a result of the poor quality of the facilities it encouraged them to use." *Empey v. Grand Trunk W. R.R. Co.*, 869 F.2d 293, 295 (6th Cir. 1989) (quotation omitted).

Furthermore, the record indicates that Diamond Jo itself believed it had an interest in and benefitted from its employees' participation in the training program. For instance, the evidence shows that Diamond Jo paid its employees their regular wages while they attended the program. *See Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1, 6 (1963) (holding that a seaman was acting in the course of his employment although he was performing services for another company because such seaman "was at all times paid by [his employer] and under [his employer's] sole supervision"). The evidence also reveals that Diamond Jo paid the costs for attending the training program and that an employee who left Diamond Jo within one year of

attending the training program would have to reimburse Diamond Jo for all tuition costs and expenses for transportation, lodging, and food. Lastly, the evidence suggests that Diamond Jo considered its employees to be under its supervision while at the training center, as shown by the fact that Rannals called Diamond Jo at the end of each day's session during the training program to report the events at the training center to Diamond Jo. In sum, in light of Diamond Jo's actions in paying its employees their wages during the program, absorbing the attendance costs for the program, requiring completion of the program as a stepping stone to supervisory positions, and listening to reports of the events at the center, we conclude that Rannals established a genuine issue of material fact regarding whether she was acting in the course of her employment at the time of her injury.

B. Negligence/Imputation of Negligence

We conclude that the district court erred in determining that Rannals failed to create a genuine issue of material fact regarding whether her injuries were caused, in whole or part, by Diamond Jo or its agents' failure to cure or eliminate an unreasonably dangerous condition about which Diamond Jo or its agents knew or should have known. Specifically, we conclude that the district court erred by holding that any negligence on the part of the training center could not be imputed to Diamond Jo and by applying the defense of natural accumulation to defeat Rannals's claim.

Under the FELA and the Jones Act, an employer has a duty to provide a safe workplace for its employees. To recover

for injuries caused by the alleged negligence of an employer under the Jones Act, a plaintiff must show that her employer failed to provide a safe workplace by neglecting to cure or eliminate obvious dangers of which the employer or its agents knew or should have known and that such failure caused the plaintiff's injuries and damages. *Perkins*, 246 F.3d at 599 ("It is a fundamental principle that, under the Jones Act, an employer 'must have notice and the opportunity to correct an unsafe condition before liability will attach.' ") (quoting *Havens v. F/T Polar Mist*, 996 F.2d 215, 218 (9th Cir. 1993)); *see also Sinclair v. Long Island R.R.*, 985 F.2d 74, 76 (2d Cir. 1993). In so doing, the plaintiff must show "actual or constructive notice to the employer of the defective condition that caused the injury." *Sinclair*, 985 F.2d at 77; *see also Perkins*, 246 F.3d at 599.

We believe that Rannals has submitted evidence sufficient to create a genuine issue of material fact regarding whether Diamond Jo was negligent in failing to cure the conditions that caused her injuries. At the outset, we note that Rannals has successfully created a genuine issue of material fact regarding whether any negligence by the training center in failing to cure the conditions that caused Rannals's injuries may be imputed to Diamond Jo. As the Supreme Court and this circuit have recognized, a third party's negligence in providing a safe workplace for an employer's workers may be imputed to the employer where that third party has a contractual relationship with the employer and the employee is acting in the course of her employment on the third party's premises. *Hopson*, 383 U.S. at 264; *Sinkler v. Missouri Pac. R.R. Co.*, 356 U.S. 326, 331-32 (1958); *Epling*, 435 F.2d at 736; *Payne*, 309 F.2d at 549.

In this case, we believe that Diamond Jo had a contractual relationship with the training center, which resulted in making the training center an agent of Diamond Jo and, in turn, exposed Diamond Jo to liability under the Jones Act for any potential negligence by the training center in failing to provide a safe workplace for Diamond Jo's employees. *See, e.g.*, *Hopson*, 383 U.S. at 264 (holding that an employer was liable for the negligence of a taxi service it hired to transport two ill seamen). In fact, we believe that Rannals's case is analogous to those negligence lawsuits brought by seamen who have suffered injuries as a result of the alleged negligence of medical providers who were selected by the seamen's employers. In those cases, federal courts, including this circuit, have consistently recognized the principle that a "shipowner is liable for the negligence of an on-shore physician *that it hires to treat a crewman.*" *Olsen v. American S.S. Co.*, 176 F.3d 891, 895 (6th Cir. 1999) (emphasis added); *see also De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138, 140 (5th Cir. 1986); *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670, 680 (2d Cir. 1971); *Maritime Overseas Corp. v. United States*, 433 F. Supp. 419, 421-22 (N.D. Cal. 1977), *aff'd in part and rev'd in part*, 608 F.2d 1260 (9th Cir. 1979). *Cf. SeaRiver Maritime, Inc. v. Industrial Med. Servs., Inc.*, 983 F. Supp. 1287, 1298-99 (N.D. Cal. 1997). In so doing, these federal courts have treated agreements between shipowners and doctors as contracts under which the doctors were agents of the shipowners and the shipowners were exposed to possible liability for the actions of such agents. *See, e.g.*, *Fitzgerald*, 451 F.2d at 680.

In our opinion, much like the employers in the medical providers cases, there is evidence that Diamond Jo entered

into a contractual relationship with the training center when it chose the training center to teach its employees firefighting skills, made the arrangements for its employees to attend the training program,[4] and paid the training center for such services,[5] and the training center accepted such work by accepting Diamond Jo's employees into its seminar and allowing them to attend its courses. Indeed, we believe that, based upon past dealings when Diamond Jo sent twelve

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4. Rannals asserted during her deposition:

> Q: And who made the arrangements for you to attend the school?
>
> A: The boat, Kevin Stier or the captains.

J.A. at 132.

5. Rannals asserted during her deposition:

> Q: And was there a fee for going to the school?
>
> A: No, other than our time.
>
> Q: Okay. So you did not have to pay the school anything —
>
> A: *No, not out of my pocket.*
>
> Q: — to go there?
>
> A: No.

J.A. at 135 (emphasis added).

employees to attend the same firefighting seminar in Toledo in both 1996 and 1997, Diamond Jo and the training center had developed an understanding that Diamond Jo would send its employees to learn valuable firefighting skills at the seminar and that the training center would train and teach such employees in a safe work environment. *See SeaRiver*, 983 F. Supp. at 1298. Although we recognize the difficulty that Diamond Jo, a riverboat casino business operating in Iowa, faces in monitoring the safety of its employees who are attending a seminar out of state in Ohio, we do not believe that such difficulties exempt Diamond Jo from liability for the actions of its agents. Rannals and her co-workers were acting in the course of their employment while attending the training program and thus were entitled to have Diamond Jo provide a safe workplace in which they could perform their jobs, including a safe place in which to arrive at and exit from work. As we previously noted in *Payne*, if an employer "delegate[s] and relies upon the services of its agent to carry out its own duty, it may not shift its liability from itself to said agent when an employee seeks to hold it directly liable." *Payne*, 309 F.2d at 549. That it was the training center, and not Diamond Jo directly, that was negligent in failing to cure dangerous icy conditions at the program does not remove liability from Diamond Jo; Diamond Jo is still responsible for the negligence of its agent, in this case, the training center. The duty to provide a safe workplace is non-delegable and exists "despite the fact that [the employer] may not own, control or be under a primary obligation to maintain the premises on which [the] employee is injured." *Id.*; *see also Ribitzki v. Canmar Reading & Bates, Ltd. Partnership*, 111 F.3d 658, 662 (9th Cir. 1997) (The duty to provide a safe workplace "extends to providing a safe place to work on the

ship of a third party over whom the employer has no control, if that is where the seaman's employer sends him to work."). Therefore, we conclude that Rannals has successfully established a genuine issue of material fact whether the training center's negligence, if found, may be imputed to Diamond Jo.

Second, we believe that Rannals has created a genuine issue of material fact as to whether the training center had constructive notice of the dangerous icy conditions in its driveways and should have cured or eliminated such conditions to reduce the possibility of harm to program attendees on site. In her deposition, Rannals testified that, on Wednesday, January 14, 1998, the day before her accident, it was "icy outside and kind of drizzling," and the temperature was "chilly." J.A. at 138. She further asserted that, on the morning of Thursday, January 15, 1998, when she and her co-workers were preparing to drive to the training center, it was icy, and some of her co-workers "had to scrape the windows" of their rental car. J.A. at 139. Additionally, according to Rannals, when she and her co-workers arrived at the training center at approximately 8:30 a.m., it was "kind of icy on the driveway" of the training center and the surrounding grassy areas, and the icy conditions at the center remained the same throughout the day until around 4:00 p.m. J.A. at 81. Furthermore, climatological records for January 15, 1998 showed that there was no freezing rain or trace precipitation after 9:00 a.m., giving the training center more than seven hours to cure or eliminate the dangerous conditions without disruption. Lastly, Rannals testified that when class ended at approximately 4:00 p.m. on January 15, 1998, "[i]t was chilly and a little icy outside yet." J.A. at

141. We believe that all of this evidence is sufficient to create a genuine issue of material fact as to whether the training center had constructive notice of the dangerous icy conditions and should have cured or eliminated such conditions to reduce the possibility of harm to program attendees on site.

Third, we believe that Rannals has created a genuine issue of material fact regarding whether the training center's alleged negligence caused her injuries and damages. During her deposition, Rannals testified that she remembered seeing "a thin layer [of ice] . . . where [she] fell." J.A. at 92. Additionally, when asked if "it [was] fair to say that . . . . the only reason [she] fell [was] because [she] slipped on ice," Rannals answered "Yes." J.A. at 96. In sum, in light of Rannals's testimony and the weather conditions on the day of the accident, we also believe that Rannals has created a question as to whether the icy conditions caused her injuries and damages and conclude that Rannals has successfully created a genuine issue of material fact regarding Diamond Jo's liability for the injuries she sustained at the training center on January 15, 1998.

Diamond Jo argues, however, that the district court was correct in concluding that Rannals's negligence claim was barred by the Ohio common-law defense of natural accumulation, which provides that a private party "has no common-law duty to remove or make less hazardous a natural accumulation of ice and snow on private sidewalks or walkways . . . or to warn those who enter upon [its] premises of the inherent dangers presented by natural accumulations of ice and snow." *Brinkman v. Ross*, 623 N.E.2d 1175, 1178 (Ohio 1993). We do not believe that the Ohio common-law

defense of natural accumulation can bar a seaman's Jones Act claim. Indeed, we believe that Rannals's case is extremely similar to *Chesapeake & Ohio Ry. Co.*, in which this court held that the question of whether an employer was negligent in failing to illuminate and salt a pathway to its ship that was often snowy and icy during the winter was a proper question for the jury. *Chesapeake & Ohio Ry. Co.*, 243 F.2d at 808-10. In so doing, this court in *Chesapeake & Ohio Ry. Co.* rejected an argument by the employer that is analogous to the natural accumulation doctrine, stating "[w]e find without merit the contention of the employer . . . that the employer owed no duty to keep the *entire ninety acres* free of snow and ice because it would be impossible to do that." *Id.* at 808. Moreover, as the Supreme Court has long acknowledged due to the remedial purpose of the Jones Act and its expansive breadth of protections, employers are generally stripped of their common-law defenses in Jones Act cases. *Rogers*, 352 U.S. at 507-08 ("The employer is stripped of his common-law defenses" and usually there is a only "single question whether negligence of the employer played any part, however small, in the injury."). We find no reason to make an exception for the defense of natural accumulation under Ohio law and thus bar Rannals's negligence claim.[6] In sum, we believe that

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6. We recognize that a direct negligence claim against the managers or supervisors at the training center who failed to cure or eliminate the allegedly dangerous, icy conditions would be governed by the Federal Tort Claims Act, 28 U.S.C. § 1346(b), which requires the application of state law to tort claims brought against the United States Government (in this case, Ohio law), because the training center was managed and run by the United States Department of Transportation. *See Federal Express Corp. v. United States Postal*

(Cont'd)

the district court erred in granting summary judgment on Rannals's negligence claim under the Jones Act.

III. CONCLUSION

In conclusion, we hold that Rannals created a genuine issue of material fact regarding whether she was acting within the course of her employment at the time of her injury on January 15, 1998; whether Diamond Jo or its agents, specifically the training center, breached a duty to provide a safe workplace for Diamond Jo's employees by failing to cure icy road conditions on the training center's driveway; whether Diamond Jo and the training center had entered into a contractual relationship as a result of Diamond Jo's payment of its employees' tuition costs and such employees' participation in the training program; and whether the training center's negligence, if found, may be imputed to Diamond Jo as a result of their contractual relationship. For the foregoing reasons, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion.

(Cont'd)
Serv., 151 F.3d 536, 541 (6th Cir. 1998). This does not, however, mean that Ohio law applies in the analysis of whether Diamond Jo would be liable for the negligence of its agent, the training center (if so found), under the Jones Act. To require the application of Ohio law in such determination would effectively render the Jones Act meaningless and would allow employers to circumvent Congress's intention to provide an expansive remedy to seamen under the Jones Act.

Appendix A

DISSENT

BOGGS, Circuit Judge, dissenting. I respectfully dissent from the court's opinion in this case, because the DOT training program was not, in any relevant sense, Diamond Jo's *agent* in providing the facilities and parking lot in which Ms. Rannals's accident occurred. The court acknowledges that Diamond Jo was not directly negligent, in any way, in choosing the United States DOT training program, or in subsidizing Rannals's attendance. *Under the law that applied to it*, the law of Ohio, DOT also was not negligent in providing the parking lot and in not preventing the natural accumulation of snow and ice. Thus, all of the relevant parties — omitting any mention of plaintiff Rannals — were acting non-negligently under any law of which they had notice. Under admiralty law, as well as ordinary tort principles, no liability should attach to the *M/V Diamond Jo*.

The cases primarily relied on by the court are fully distinguishable, because they involve third parties performing the "operational activities" of the ship, a term of art under FELA and the Jones Act. *See* THOMAS J. SCHOENBAUM, 1 ADMIRALTY AND MARITIME LAW § 6-21 (3d ed. 2001). Shipowners are under a duty to provide medical care to seamen, and if they hire someone to perform their own duties, it is reasonable to impute any negligence to them, so that they cannot avoid their liabilities by outsourcing provision of mandatory services. For the same reason, such agents should be held to the same standard of care. *Empey* is equally distinguishable on this ground, because the railroad was required by statute to provide housing for its off-duty employees. *See Empey v. Grand Trunk Western R.R. Co.*, 869

F.2d 293, 294 (6th Cir. 1989). For similar reasons, the law does not allow evasion of Congressional protection by having employees carry out the "operational activities" of the employer on the premises of another. *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 332 (1958).

With regard to training at the DOT facility, however, the situation is much different, and both law and policy counsel a different result. Diamond Jo was simply taking advantage of a DOT program provided to shipowners generally — it was not using the DOT to carry out its operational activities, nor did it have a duty to provide this training to low-level employees (a duty that carries with it the concomitant duty of non-negligent provision). Similarly, the activities of Ms. Rannals or the other trainees were not "operational" because they were not imposed as duties of employment (indeed, the accident did not even occur in the course of the training itself). The employer did not require the fire safety training any more than it might have "required" attendance at the merchant marine academy, or a Master's license, for even higher positions on the ship than the one sought by Rannals.

Even when an employee is acting within the scope of his employment, he is not necessarily at his "workplace." And while a Jones Act employer has extensive liability, it is not an absolute insurer for everything that may happen to an employee off of the employer's premises. When the employee is not engaged in "operational activities," the employer's duty to provide a reasonably safe place to work does not reach further than the ship, the employee's usual location of work, and the means of egress and ingress to those locations. 1 ADMIRALTY § 6-21, at 325. Although I have been unable to

identify a case that extends employer liability as far as the court has done here, a somewhat similar situation was presented by *Salamon v. M/V Poling Bros. No. 11, Inc.*, 751 F. Supp. 343 (E.D.N.Y. 1990). Salamon was the ship's cook, and left the vessel to obtain groceries in order to prepare the evening mess. He traveled down the dock some 300 feet to the stair, where he slipped and fell. *Id.* at 344. Salamon's Jones Act negligence claim survived a motion for summary judgment, but only because the cook had to use that exit to fulfill his responsibilities, the officers of the ship were familiar with dark stairway, and it was "only some 300 feet away." The court made clear that "it would be unreasonable to impose a duty on Poling to inspect plaintiff's route all the way to the grocery store and back and to take precautions over the entire way." *Id.* at 345.

Not one of the conditions deemed relevant in *Salamon* pertains in this case. Rannals was not fulfilling a "responsibility," the ship had no possible notice of the conditions, and Rannals was several thousand times further away from her ship than Salamon was from his. We should not impose an "unreasonable" duty not only to inspect the entire route, but also to require the shipowner to inspect the grocery store as well (where the ship might well have "contracted" for supplies). Certainly, the distance of the "store" and any familiarity the ship's master or owner might have with it cannot be simply irrelevant to what employer precautions are deemed "reasonable" (i.e., are cost-justified). Moreover, under the court's theory, as between the seaman picking up supplies and his ship, the safety condition of the store would not be judged under the well-developed *state law* on slip-and-fall, but under the more exacting standards

of the Jones Act. As in this case, such a "duty" bids fair to allow a negligence action to proceed-despite the absence of any negligence.

I

Our standard of review in this case is the normal one applicable to summary judgment. *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (en banc), makes clear that although the requirement of proximate cause is loosened for seamen, they retain the burden of producing sufficient evidence for a rational trier of fact to find in their favor under this relaxed standard. The district court in this case, as well as our opinion, accepts *Gautreaux*. This makes clear that all our statements about relaxing the plaintiff's burden have solely to do with the level of causation, and not with the quantum of *evidence* of that minimal causation that the plaintiff must produce to survive summary judgment.

As there is *no* evidence of direct negligence, plaintiff's claim must proceed under a theory of imputation. Two possible bases for imputing liability in these circumstances were discussed in *Empey*. *See Consolidated R.R. Corp. v. Ford Motor Co.*, 751 F. Supp. 674, 679 (E.D. Mich. 1990) (noting that the "Sixth Circuit's discussion of imputed liability in *Empey* appears to recognize two bases for such liability"). On the one hand there are *Sinkler* agency cases, on the other hand, there is the employer's own non-delegable duty to provide a safe workplace. The court's opinion discusses both theories, but without showing that Rannals has stated a claim under either. *See, e.g., supra* at 12, in which the court states that Diamond Jo is responsible for

"the negligence of its agent, in this case, the training center[,]" but then immediately turns to a discussion of Diamond Jo's alleged breach of *its own* duty to provide a safe workplace.

The Department of Transportation is not the agent of Diamond Jo Casino. "The law of agency is fully applicable in admiralty." 1 ADMIRALTY § 5-2, at 175. As the court is fully aware, the mere fact that a contract exists between two parties does not make one the agent of the other. And although an employer *may* be liable for the negligence of its independent contractor under the Jones Act, it has never been suggested that the mere existence of a contractual relationship with the employer *mandates* indirect liability. The DOT provided a service to Rannals, subsidized in her case by Diamond Jo, but did not thereby become Diamond Jo's agent (or that of any of the other similarly situated shipowners), because it was not performing any duties or operations of the vessel. *Sinkler* and its progeny do not allow an agency to be created where neither party had the intent to create one.

Although the court continually calls the DOT Diamond Jo's agent, it fundamentally appears to rely on the duty of a FELA/Jones Act employer to provide a safe "workplace." This requires showing that not only was Rannals "working" but that she was at a "workplace," which are not the same thing. As seaman Salamon was walking along the dock, one could argue he was still at his "workplace," 751 F. Supp. at 345, but the *Salamon* court did not suggest that the store where he was going was equally his workplace. In *Empey*, where the hotel was an integral part of the defendant's operation by providing housing, it was plausible to include it as part of the workplace. By contrast, if payment of tuition

can establish the individual is working at a workplace, then a college or maritime academy where the employee is sent (or, apparently, *chooses* to go) would also create liability for the employer.

Even if we should consider the parking lot of the school to be a workplace, our precedents would not require abrogation of all common-law defenses of the *third party* to negligence under the *Shenker/Empey* workplace doctrine. The citation of the *Chesapeake* case, *supra* at 14, regards *direct* liability of the employer. There are two ways that the employer can breach his duty to provide a safe workplace on the premises of others. He can be on notice of an unsafe condition and fail to take reasonable care. He is stripped of his common-law defense if he breaches this duty. However, the court agrees this situation does not pertain, making *Chesapeake* only indirectly relevant. If instead the breach of the duty occurs through imputation, it is less clear that common-law defenses are irrelevant. Combining the two doctrines (for which the court has no obvious precedent) is unwarranted and pernicious. If the third party is in compliance with its jurisdiction's common-law negligence rules, the ship will be unable to maintain a subsequent action against that third party. Any attempt by either the third party or the ship to monitor the third party-where operational activities are not implicated-would be prohibitively cumbersome, particularly given the requirement that the shipowner be aware of the differing standards of care prevailing wherever it does business.[1]

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1. Even supposing that there were the need to create a hybrid rule of imputed liability in order to assist Jones Act plaintiffs, the (Cont'd)

Assuming that under *Empey*, and favorably construing the facts, Rannals could be found to be acting within the scope of her employment, this only adds to the irony of the court's conclusion. Apparently, if Diamond Jo had given Dawn Rannals no wages during her week in Toledo and refused to pay her tuition or travel expenses, the court would not hold Diamond Jo liable for this accident. The court punishes Diamond Jo in the name of safety for subsidizing the safety training of its employees and for its investment in the greater safety of the vessel and the employee's fellow seamen.

Because there is *no* negligence by Diamond Jo, and because DOT was not the ship's agent under *Sinkler*, Diamond Jo can only be liable for failure to provide a "safe workplace." It is unreasonable to construe the school as a "workplace" and even if it were so construed, whether it is

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(Cont'd)
court's would seem a poor one. A better alternative, one equally consistent with admiralty precedent and policies, would allow the seaman to maintain an action against his employer if the third party would be negligent under the *local* standards. This allows immediate recovery by the employee, without the necessity of his proceeding in an inconvenient and foreign forum, but it eventually shifts the cost to the responsible party, rather than leaving the employer "holding the bag" as absolute insurer. Further, it better balances state and federal interests involved in a choice of law. *See Steelmet, Inc. v. Caribe Towing*, 779 F.2d 1485, 1488 (11th Cir. 1986) (stating that if "there is an admiralty-state conflict, comparative interest must be considered"). The court's rule provides an incentive for shipowners to attempt to compel all those with whom they do business to adhere to federal standards of care, in derogation of the laws of the several states.

"safe" should not be assessed under the Jones Act rules, but rather by the standard of care of which the third party was aware. The court's rule allows recovery where *no party has been negligent* under the law as it could be known to them. Diamond Jo is aware of the Jones Act rules on negligence, and it abided by them. DOT was aware of Ohio's rules of negligence, and it abided by them. Had DOT actually accepted the role of an agent of a Jones Act employer, it should be deemed to be governed by FELA rules, but otherwise it should not lose the defenses on which it reasonably relied, and which Diamond Jo had no notice were inapplicable. I respectfully dissent.

APPENDIX B — MEMORANDUM OPINION AND JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED AND FILED SEPTEMBER 29, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:98 CV 7545

DAWN RANNALS,

Plaintiff,

– vs –

DIAMOND JOE CASINO,

Defendant.

MEMORANDUM OPINION

KATZ, J.

This matter is before the Court on Defendant's motion for summary judgment. For the following reasons, Defendant's motion will be granted.

BACKGROUND

Plaintiff Dawn Rannals brought this action under the Jones Act, 46 U.S.C. § 688, to recover for injuries she

suffered in the scope of her employment for Defendant Diamond Jo Casino, but while she was off Defendant's premises. At all relevant times to this suit, Plaintiff was employed as a deckhand aboard the M/V Diamond Jo in Dubuque, Iowa.

In January of 1998, Plaintiff and three other employees attended a week-long firefighting training program at the Great Lakes Region Fire Training Center ("Training Center") in Toledo, Ohio. Plaintiff was not required to attend the training as a condition of her employment, but the completion of such training was a prerequisite for promotion to some supervisory positions. She was paid by her employer for the time she spent at the training program. The Training Center is operated by the United States Department of Transportation.

At approximately 4:00 p.m. on January 16, 1998, the fourth day of the program, Plaintiff slipped on a small patch of ice and frost in the Training Center parking area, and injured her leg. There had been freezing rain, mist and snow in Toledo early that morning; the temperature hovered in the mid-twenties for most of the day.

Defendant paid Plaintiff's medical expenses and lost wages pursuant to its "maintenance and cure" obligations. Plaintiff also brought this negligence[1] action against Defendant, claiming that Defendant defaulted on its obligation to furnish her with a reasonably safe place to work. Defendant has moved for summary judgment on Plaintiff's

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1. Plaintiff's original complaint also included claims for maintenance and cure. The parties now agree that Defendant satisfied its maintenance and cure obligation.

negligence claim. Plaintiff has filed opposition and Defendant has replied thereto. The Court discusses the parties' contentions below.

DISCUSSION

A. Summary Judgment Standard

As an initial matter, the Court sets forth the relative burdens of the parties once a motion for summary judgment is made. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 191 L. Ed. 2d 265 (1986). Of course, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323, 106 S. Ct. at 2553. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2541, 91 L. Ed. 2d 202 (1986) (quoting Fed. R. Civ. P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith*

Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

B. Employer's Duties Under the Jones Act

The Jones Act provides a cause of action in negligence for "[a]ny seamen who shall suffer personal injury in the course of his employment." 46 U.S.C. § 688(a). In order to recover for a violation of the Jones Act, a plaintiff must establish: (1) that she is a "seaman," as defined by the Act; (2) that she was injured in the course of her employment; (3) negligence on the part of the employer, or some basis for imputing the negligence of another to the employer; (4) causation to the extent that the employer's negligence was the cause "in whole or in part" of her injury; and (5) damages. *See Hernandez v. Trawler Miss Vertie Mae, Inc.*, __ F.3d __, No. 98-1976, 1999 WL 592048 (4th Cir. Aug. 6, 1999); *Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 357 (5th Cir. 1999); *Ribitzki v. Canmar Reading & Bates, L.P.*, 111 F.3d 658, 662 (9th Cir. 1997); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (en banc). In establishing a Jones Act claim based on negligence, the elements of duty, breach, and injury draw on common law principles; the

element of causation is relaxed; and common law defenses such as contributory negligence and assumption of the risk are modified or abolished. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543-44, 114 S. Ct. 2396, 2404, 129 L. Ed. 2d 427 (1994) (discussing FELA);[2] *Gautreaux*, 107 F.3d at 335. The duty of care owed is one of ordinary prudence; the employer is not an insurer of the employee's safety, and the employer is required to take precautions only against risks that are reasonably foreseeable. *See Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67, 63 S. Ct. 444, 451, 87 L. Ed. 610 (1943) *Hernandez*, 1999 WL 592048 at __; *Ribitzki*, 111 F.3d at 662 n.3; *Gautreaux*, 107 F.3d at 335; *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3d Cir. 1995).

The Jones Act imposes upon the employer a nondelegable duty to provide the seaman with a safe place to work. That duty extends to providing a safe place to work on the facility of a third party over whom the employer has no control, if that is where the employer sends the seaman to work. *Ribitzki*, 111 F.3d at 662. As is always true in negligence cases, the employer is liable under the Jones Act if it or its agents either knew or should have known of the dangerous condition that caused the seaman's injury. This implies a duty of reasonable inspection, which extends to an employer who sends employees to work on the premises of a third party. *Shenker*

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2. The Jones Act incorporates by reference the "judicially developed doctrine of liability under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, *Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958); thus the case law construing the FELA is equally applicable to the Jones Act. *Ballard v. River Fleets, Inc.*, 149 F.3d 829, 831 n.3 (8th Cir. 1998).

v. Baltimore & Ohio R.R. Co., 374 U.S. 1, 8, 83 S. Ct. 1667, 1672, 10 L. Ed. 2d 709 (1963).

C. Application to the Case at Bar

In this case, the parties do not dispute that Plaintiff is a seaman, that she was injured by slipping on a patch of ice while at the Training Center, and that the patch of ice caused the damages she suffered. The issues before the Court are (1) whether a reasonable jury could find that Plaintiff was injured in the scope of her employment; and (2) whether a reasonable jury could find that Defendant was negligent in failing to discover and remove the patch of ice in the Training Center parking lot.

1. *Scope of Employment*

Defendant argues that Plaintiff was not in the scope of her employment at the time of her injury because at the time of her injury she was off of Defendant's premises, involved in a training activity that was not required for her job. Plaintiff responds that, although she was not required to attend the firefighting training as part of her job, she was there for the benefit of her employer as well as herself, and her employer paid her for the time she spent at the Training Center. She argues that whenever an employer provides its employees with facilities and encourages them to use those facilities, the employees' use of such facilities is within the scope of their employment for purposes of the Jones Act. *See Empey v. Grand Trunk W. R.R. Co.*, 869 F.2d 293, 295 (employer liable for negligently maintained hotel owned by third party); *Moore v. Chesapeake & Ohio Ry. Co.*, 649 F.2d 1004 (4th Cir. 1981) (employer liable for negligently maintained

cafeteria owned by third party); *Carney v. Pittsburgh & Lake Erie R.R. Co.*, 316 F.2d 277 (3d Cir. 1963) (employer liable for negligently maintained hotel owned by third party).

The parties have not cited to any reported cases discussing whether an employee is in the scope of her employment for purposes of the Jones Act while she is participating in an off-site training activity that is not required by her employer, but for which the employer is paying. The Court has been unable to find any reported cases on point. Although the issue is somewhat close, the Court finds in this instance that a reasonable jury could find that Plaintiff was injured in the scope of her employment for Defendant, since scope of employment is defined broadly under the Jones Act. It is not disputed that Defendant both encouraged Plaintiff to attend the Training Center and provided her with the opportunity to do so, and that Plaintiff's successful completion of the program would benefit Defendant.

The next issue the Court must address, therefore, is whether a reasonable jury could find that Defendant was negligent in failing to discover and remove the patch of ice in the Training Center parking lot.

2. *Unreasonably Dangerous Condition*

In order for the patch of ice in the parking lot to give rise to a viable negligence claim, the patch of ice must constitute an unreasonably dangerous condition which the property owner had a duty to remove. The longstanding majority rule, which is also the rule in Ohio, is that a landowner cannot, as a matter of law, be negligent for failing to remove a natural accumulation of ice or snow on its

premises. *Brinkman v. Ross*, 68 Ohio St. 3d 82, 623 N.E.2d 1175 (1993); *accord Nieves v. United States*, 980 F. Supp. 1295 (N.D. Ill. 1997); *Jones v. Hansen*, 867 P.2d 303 (Kan. 1994); *Anderson v. Fox Hill Village Homeowners Corp.*, 676 N.E.2d 821 (Mass. 1997); *Doyle v. City of Roseville*, 524 N.W.2d 461 (Minn. 1994); *Fulton v. Robinson Indus., Inc.*, 664 So. 2d 170 (Miss. 1995); *Wiseman v. Hallahan*, 945 P.2d 945 (Nev. 1997); *Paulson v. Andicoechea*, 926 P.2d 955 (Wyo. 1996). This is because:

> in a climate where there are frequent snowstorms and sudden changes of temperature, these dangerous conditions appear with a frequency and suddenness which defy prevention and, usually, correction; consequently, the danger from ice and snow in such locations is an obvious one, and the occupier of the premises may expect that an invitee on his premises will discover and realize the danger and protect himself against it.

Paulson, 926 P.2d at 957 (quoting 62A Am. Jur. 2d Premises Liability § 699 (1990)).

There do not seem to be any reported cases establishing a federal common law regarding premises liability for natural accumulations of ice and snow. The few federal cases involving slip and fall accidents on natural accumulations of precipitation have arisen under the Federal Tort Claims Act, and Courts addressing those cases have applied the liability rules of the states in which the injuries occurred. *E.g.*, *Athas v. United States*, 904 F.2d 79 (1st Cir. 1990); *Hungate v. United States*, 626 F. 2d 60 (8th Cir. 1980); *Munsill*

v. United States, 14 F. Supp. 2d (D.R.I. 1998); *Pytlewski v. United States*, 991 F. Supp. 1043 (N.D. Ill. 1998); *Milesi v. United States*, 946 F. Supp. 110 (D. Mass. 1996); *see* 28 U.S.C. § 1346(b)(1). In the absence of any indication to the contrary in the federal common law, this Court finds that application of the majority rule is proper in this case. Therefore, the Court holds that a landowner cannot be liable for negligence under the Jones Act for failure to remove a natural accumulation of snow and ice in a parking lot.

It is true that a minority of jurisdictions allow a plaintiff to bring a claim for negligent failure to remove a natural accumulation of snow and ice under certain circumstances. Even in those jurisdictions, however, the plaintiff must demonstrate the existence of some unusual factor, above and beyond the mere existence of the snow and ice, in order to have a viable claim for negligence liability. In *Brown v. Alliance Real Estate Corp.*, for instance, the Supreme Court of Oklahoma held that a landowner could have a duty to warn pedestrians of the existence of a known patch of "black ice" which would not otherwise be perceptible to them. *Brown v. Alliance Real Estate Corp.*, 976 P.2d 1043 (Okla. 1999); *contra Selby v. Danville Pepsi-Cola Bottling Co., Inc.*, 523 Ill. App. 3d 427 (1988); *Hynes v. American Stores Co.*, 1 Mass. L. Rptr. 426 (Mass. Super. 1993); *Eiselein v. K-Mart, Inc.*, 868 P.2d 893 (Wyo. 1994) (all holding no duty to warn about the existence of black ice). In *Iwai v. State*, the Supreme Court of Washington held that a landowner might have a duty to remove a natural accumulation of snow and ice if the landowner "has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable person in that position the advantages of doing

so would outweigh the apparent risk;" thus, a landowner was held to have a duty to clear a walkway when the entire walkway was obstructed and there was no viable alternate route. *Iwai v. State*, 915 P.2d 1089, 1093-94 (Wash. 1996) (citing Restatement (Second) of Torts § 343A cmt. f (1965)).

Even under the relaxed standard of the minority rule, Plaintiff's claim must fail on the facts before the Court. She has made no showing of any unusual condition, above and beyond the mere existence of the patch of ice, that could give rise to a finding of negligence. She does not claim that the patch of ice was hidden or was otherwise imperceptible to her. She does not claim that the walkway was obstructed, or that she could not easily have avoided the patch of ice by simply stepping a few inches to the side in either direction; indeed, it appears from the record evidence that the grass walkway and parking lot were otherwise relatively clear, albeit slippery, at the time of Plaintiff's fall. On these facts, there is not a jurisdiction in the country that would allow Plaintiff's negligence claim to go forward under a theory of either direct or imputed negligence on the basis of the Training Center's failure to remove the ice.

3. *Notice of Dangerous Condition*

Furthermore, even if a reasonable jury could find that the ice patch was an unreasonably dangerous condition that Defendant had a duty to remove — although it is undisputed that the Training Center itself cannot have had a duty to remove the ice patch[3] — Defendant can only be liable on a

3. Since the Training Center is a federal facility, its liability is governed by Ohio law, pursuant to the Federal Tort Claims Act.

theory of direct negligence if it either knew or should have known of the dangerous condition.

It is not disputed that Defendant lacked actual knowledge that the Training Center parking lot might be icy. Defendant could, however, be charged with constructive notice, in the exercise of reasonable care, Defendant ought to have known about or discovered the alleged dangerous conditions of the parking lot. If, by a reasonable inspection, Defendant could have discovered the icy conditions in the Training Center parking lot, Defendant must be charged with knowledge of that condition.

No reasonable jury could find that Defendant was negligent in failing to discover the ice in the Training Center parking lot. The ice in the parking lot was a temporary condition, probably about nine hours old. It is undisputed that no complaints had ever been made to Defendant about unsafe conditions in the Training Center, and that Defendant was not on actual notice that there might be a problem. In order to discover and remove the ice in the Training Center parking lot, Defendant would have had to (a) monitor weather conditions in a city 370 miles away; (b) send a representative to Toledo on short notice; (c) conduct an inspection not only of the occupied areas of the Training Center, but of a section of the parking lot several yards away from the building; and (d) remove the patch of ice. It is untenable to argue that Defendant's failure to conduct such an inspection on the facts of this case amounted to "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm," see Restatement (Second) of Torts § 282 (1965), when Defendant had no information

that would indicate the existence of a potential problem. Accordingly, the Court finds that Defendant was not on constructive notice of the icy conditions in the Training Center parking lot.

C. Unseaworthiness

Plaintiff has also brought a claim for unseaworthiness in her complaint. Defendant has correctly pointed out in its motion for summary judgment that Plaintiff cannot bring a claim for unseaworthiness where she was not injured on a seagoing vessel. Plaintiff has not opposed Defendant's argument on this point. Plaintiff's claim for unseaworthiness will also be dismissed.

CONCLUSION

For the foregoing reasons, the Court finds that no triable issue of fact exists upon which a jury could find Defendant liable for negligence. Accordingly, Defendant's motion for summary judgment is granted in its entirety.

IT IS SO ORDERED.

s/ David A. Katz
DAVID A. KATZ
U. S. DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:98 CV 7545

DAWN RANNALS,

Plaintiff,

– vs –

DIAMOND JOE CASINO,

Defendant.

JUDGMENT ENTRY

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendant's motion for summary judgment (Doc. No. 14) is granted in its entirety.

s/ David A. Katz
DAVID A. KATZ
U. S. DISTRICT JUDGE

APPENDIX C — RELEVANT DOCUMENTS

[Omitted here but submitted separately as Lodging]

(2)

FILED
JAN 11 2002
CLERK

No. 01-876

IN THE

Supreme Court of the United States

DIAMOND JO CASINO,

Petitioner,

v.

DAWN RANNALS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER

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The American Insurance Association ("AIA") respectfully submits this brief as *amicus curiae* in support of the Petition for Writ of Certiorari filed by Diamond Jo Casino.[1] In accordance with Rule 37.2(a) of this Court, the AIA obtained the written consent from both the Petitioner and the Respondent.

INTEREST OF *AMICUS CURIAE*

The AIA's roots go back more than 130 years to the establishment of the National Board of Fire Underwriters in 1866, and today, it has evolved into a national trade association representing 410 companies writing property and casualty insurance in every state and jurisdiction of the United States. The purposes of the AIA are to promote the economic, legislative, and public standing of its members; to provide a forum for discussion of policy problems of common concern to its members and the insurance industry; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property. The AIA is headquartered in Washington, D.C., maintains seven regional offices, and retains legislative counsel in every state.

SUMMARY OF THE ARGUMENT

Certiorari should be granted in this case because the Sixth Circuit takes an unprecedented leap from existing maritime and agency law by holding that a Department of the United States Government is the agent of a private Jones Act employer corporation. By stretching the bounds of agency law while simultaneously taking the concept of foreseeability to unpredictable limits,[2] the Sixth Circuit punishes a party in the

1. This brief was authored by James Patrick Cooney and Chester J. Makowski, the attorneys representing the AIA. No person or entity other than the AIA made a monetary contribution to the preparation or submission of this brief. The AIA has the consents of the parties and such consents are being lodged herewith.

2. In the instant case, the majority acknowledged the difficulty that Diamond Jo, a riverboat casino business operating in Iowa, faces in monitoring the safety of its (Cont'd)

name of safety for subsidizing the safety training of its employees and for its investment in the greater safety of the general public. The Sixth Circuit's decision allows recovery where no party has been negligent under the law as it could be known to them.[3] The decision wreaks havoc upon traditional underwriting practices and discourages responsible corporate citizens from taking measures which benefit the safety of the general public.

The law has historically recognized the value of taking preventative safety measures and has actively encouraged actors to do so. This principle is recognized in a number of areas, such as: (1) the Federal and many state Rules of Evidence prohibiting admission of evidence regarding remedial measures taken after an accident; (2) state dram shop laws that encourage tavern owners to send their bartenders to state certification programs which carry with them a safe harbor defense in the event the tavern owner is subsequently sued; (3) in the context of Title VII of the Civil Rights Act of 1964, an employer has a defense to allegations of sexual harassment if the employer (a) exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer; and (4) in the numerous Good Samaritan laws which encourage volunteers to come to the aid of the injured. The Sixth Circuit's decision controverts the sound public policy underlying such laws by discouraging, rather than

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(Cont'd)

> employees who are attending a seminar out of state in Ohio, [however] we do not believe that such difficulties exempt Diamond Jo from liability for the actions of [the Department of Transportation].

Rannals v. Diamond Jo Casino, 265 F.3d 442, 451 (6th Cir. 2001).

The obligation imposed by the Circuit upon Diamond Jo and others similarly situated is truly one that cannot be enforced. As noted by this Court, "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *The Western Maid*, 257 U.S. 419, 433 (1922).

3. *See Diamond Jo*, 265 F.3d at 456.

promoting, responsible corporate citizens from participating in safety programs that benefit the general public.

ARGUMENT

I. THE SIXTH CIRCUIT'S UNPRECEDENTED DECISION IMPOSES AN UNFOUNDED AND UNWORKABLE AGENCY RELATIONSHIP UPON THE UNITED STATES GOVERNMENT.

In an attempt to permit Ms. Rannals an avenue of recovery against her employer, the Sixth Circuit stretches the bounds of agency law, takes an unwarranted and ill-advised course, and holds that a department of the Executive Branch, the Department of Transportation ("DOT"), is the agent of a private corporate citizen.

A. No Court Has Ever Held that the Government May Be the Agent of a Private Citizen

Although there are certainly instances when a private citizen or a corporation may act as an agent of the government, *e.g.* in the context of a corporation fulfilling a governmental function or an individual citizen acting on behalf of the government,[4]

4. A private agency, an organization, an individual or a group of persons can be federal "instrumentalities" only to the extent that there is a clearly expressed Congressional intent to create a "principal/agent" relationship between the government and these private parties. In other words, one cannot call himself an "instrumentality" or "arm" of the government merely because he believes himself to be, or even because he happens to be, fulfilling a legitimate governmental purpose. Rather, the extent to which a private entity can be deemed to be acting on behalf of or in the place of the federal government can be determined only by a careful examination of the relevant federal statutes and regulations, and the available legislative history. *See, e.g.*, *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995) (where this Court stated that a corporation is a part of the government for constitutional purposes where the government creates the corporation by special law for the furtherance of governmental objectives and controls the corporation by retaining for itself permanent authority to appoint a majority of the corporation's directors. *Lebron* considered whether a corporation is an agency or (Cont'd)

no court has ever held that a Department of the United States Government acts as an agent of a private citizen or a corporation. The reason is obvious: no private actor may rightfully assert control over the acts of the federal government as required to sustain an agency finding.

The absence of a principal/agent relationship flowing from private vessel owners to the United States Government is exemplified by the Public Health System ("PHS") hospitals which originated in 1798 with the passage of the law creating the Marine Hospital Fund to care for merchant seamen.[5] Mariners who were injured or became ill while onboard a vessel were entitled to treatment at these hospitals.[6] ***Over the 183 year life span of the government-run PHS hospitals, no one ever asserted, and no court ever held, that the PHS was an agent of vessel owners even though shipowners could be held liable for a physician's negligence because of the vessel's duty to provide medical care to its crew.***[7]

(Cont'd)
instrumentality of the United States for the purpose of individual rights guaranteed against the government by the Constitution. The threshold consideration for invoking federal constitutional protection is whether federal governmental action is involved, as purely private corporate action does not trigger any constitutional protections). *See also, Correctional Servs. Corp. v. Malesko*, __ U.S.__, 112 S. Ct. 515 (2001) (holding that *Bivens* cause of action may not be extended to confer a right of action for damages against private corporate entities acting under color of federal law).

5. ACT OF JULY 16, 1798, 1 STAT. 605.

6. Clerks in the Treasury Department initially ran the fund, but after 1870 responsibility for the hospitals passed to the Surgeon General of the Marine Hospital Service (later to become the Public Health Service) and its Commissioned Corps. In 1981, as part of the Reagan Administration's budget cuts for the Department of Health and Human Services (renamed in 1980), the last of the PHS hospitals and clinics were closed. *See* http://www.nih.gov.

7. *See* footnote 15 below.

B. The Court's Unprecedented Agency Theory Erroneously Extends the Operational Activities Doctrine Beyond Any Reasonably Cognizable Boundaries

The Sixth Circuit holds that the DOT, which sponsored a fire fighting safety program voluntarily attended by Rannals, was Diamond Jo's agent for Rannals' slip-and-fall in the DOT's parking lot. However, the Sixth Circuit's conclusion that a principal/agent relationship exists based upon the operational activities doctrine is unfounded and misconstrues the rationale behind the doctrine.

In *Hopson v. Texaco, Inc.*,[8] this Court held that the Federal Employers' Liability Act is incorporated into the Jones Act and renders an employer liable for the negligence of its officers, agents, or employees. Adopting the principle first expressed in *Sinkler v. Missouri Pacific Railroad Co.*,[9] this Court concluded that an employer may be held responsible for the negligence of a third-party when the third-party is performing, under contract, the operational activities of a seaman's employer. In *Hopson*, two seaman who became ill in a foreign port were unable to continue their voyage. This Court found the employer liable for their injuries suffered during their transport in a local taxi cab to the United States Consul.[10] This Court focused on the fact that federal law mandated that before a vessel may lawfully sail, a seaman incapacitated in a foreign port must be discharged through transport to a United States Consul.[11]

In construing the term "operational activity," other courts have also seized on the necessity of the third-party's activities to the employer's operations.[12] For example, in *Mounteer v. Marine Transport Lines, Inc.*, the court explained that a third-

8. 383 U.S. 262 (1966).

9. 356 U.S. 326, *reh'g denied*, 356 U.S. 978 (1958).

10. 383 U.S. at 264.

11. *Hopson*, 383 U.S. at 263-64.

12. *See Sinkler*, 356 U.S. at 327 (emphasizing the vitality of the activity); *Hanks v. California Co.*, 280 F. Supp. 730 (W.D. La. 1967).

party may "be an agent for Jones Act purposes if it serves as an integral part of the employer's enterprise and performs an 'operational activity,' particularly if the activity is a statutory obligation for the benefit of the employee."[13] An operational activity is a necessary function of the employer's business that the employer might usually perform, but has chosen instead to contract out to others.[14] A prime example is the provision of medical care to a vessel's crew, which implicates the well-established legal obligation of an employer to provide maintenance and cure to its crew members.[15]

Other considerations include the existence of a contract, the employer's choice of the third-party, and the employer's ownership or other financial interest in the third-party.[16] The element of control is of great significance.[17]

None of the foregoing factors are present in this case. Diamond Jo did not and could not exercise any control over the DOT. Diamond Jo did not own, operate, control, supervise, or direct any portion of the DOT's fire fighting program, which

13. 463 F. Supp. 715, 719 (S.D.N.Y. 1979) (emphasis added).

14. *Williams v. Norfolk So. Ry. Co., Inc.*, 767 F. Supp. 756, 761 (E.D. Va. 1991).

15. *See De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138 (5th Cir. 1986) (shipowner vicariously liable for negligence of physician it hires to treat its crew because of duty to provide prompt and adequate medical care to its seamen); *Joiner v. Diamond M Drilling Co.*, 688 F.2d 256 (5th Cir.), *reh'g denied*, 688 F.2d 840 (5th Cir. 1982) (employer liable for its negligent selection of an onshore physician and vicariously liable for the negligence of its shipboard physician); *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670 (2d Cir. 1971) (physician considered employer's agent when he treated crew member in response to injuries suffered aboard the employer's vessel); *Central Gulf S.S. Corp. v. Sambula*, 405 F.2d 291 (5th Cir. 1968) (employer liable under agency theory for negligence of independent physician who discharged employer's obligation to provide maintenance and cure through provision of medical care to crew member).

16. *Tim v. American Pres. Lines, Ltd.*, 409 F.2d 385 (9th Cir. 1969).

17. *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 478-79 (9th Cir.), *cert. denied*, 513 U.S. 875 (1994).

was open to and attended by personnel from a number of different industries and other employers.[18] Diamond Jo did not provide any of the gear, clothing, equipment, or vessel appurtenances used in the training program. Nor was Rannals required by any statute, the United States Coast Guard ("Coast Guard") or her employer to attend the school. The Sixth Circuit extends the operational activities doctrine beyond any reasonably cognizable boundary solely to afford Rannals a remedy against her employer in this instance. This result-oriented decision flies in the face of longstanding maritime and agency precedent, as well as this Court's pronouncements in *Hopson* and *Sinkler*. Review is warranted to correct this gross aberration and restore order to the law.

II. THE SIXTH CIRCUIT'S DECISION EVISCERATES TRADITIONAL CONCEPTS OF INSURANCE UNDERWRITING BECAUSE INSURERS CANNOT ADEQUATELY ASSESS THE RISK INVOLVED FOR ACTS OF A THIRD-PARTY OVER WHOM THE INSURED EXERCISES ABSOLUTELY NO CONTROL.

Risk is at the heart of insurance. As has been noted by commentators, recognition and identification of the risk element is essential to developing techniques for managing the unknown, and the transfer and distribution of that risk.[19] In assessing premiums and setting reserves for potential losses, underwriters try to limit the unknown by examining the potential risk exposure, studying past losses, the current activities of the insured, and how that risk can be minimized.

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18. As a logical extension of the Sixth Circuit's decision, the DOT will now be required to ascertain and to apply different standards of care, depending upon the particular status of each student attending its safety training programs.

19. ROBERT E. KEETON & ALLAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES AND COMMERCIAL PRACTICES 10-11 (1988).

Of course, it is impossible to totally eliminate uncertainty; however, the management of risk is an attainable goal.[20] One form of risk management is risk control which is accomplished by conducting a venture so that risk is minimized.[21] This control of risk is effected by means of: (1) instrumentalities, *e.g.*, train whistles, audio reverse indicators, and anti-lock brakes, or (2) regulation, *e.g.*, toxic waste regulation and dram shop legislation, or (3) safety programs implemented by employers or governmental agencies. The key to minimizing risk and creating a safer world is control over the variables. In the case before this Court the element of control, as acknowledged by the Sixth Circuit's opinion, is clearly lacking.[22]

By utilizing a misplaced agency theory and thereafter mixing and matching liability theories, the Sixth Circuit transforms the DOT's non-existent premises liability under Ohio law to a Jones Act liability for Ms. Rannals' employer, Diamond Jo Casino. While the Sixth Circuit allows recovery where no party has been negligent under the law as it could be known to them, it also, in essence, renders the DOT an additional insured by imposing liability on a Jones Act employer. All this is accomplished without an underwriter being able to assess the potential exposure to an insurer for activities and actors that the Sixth Circuit recognizes are, as a practical matter, impossible for Diamond Jo to control.[23]

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20. *Id.* at 10.
21. *Id.* at 11.
22. *See* footnote 2 above.
23. *Diamond Jo*, 265 F.3d at 451.

III. THE SIXTH CIRCUIT'S DECISION FRUSTRATES THE SOUND PUBLIC POLICY OF ENCOURAGING PEOPLE TO TAKE STEPS IN FURTHERANCE OF ADDED SAFETY. COURTS HAVE LONG RECOGNIZED THE VALUE OF ENCOURAGING THE ADVANCEMENT OF PUBLIC SAFETY.

A. The Coast Guard's Programs: An Effort to Improve Safety on the Seas

In addition to DOT's providing fire fighting training at its facilities across the country, the Coast Guard also sponsors numerous safety programs for the betterment of the maritime industry.

In an effort to promote safety on the navigable waters of the United States, the Coast Guard, in cooperation with the maritime industry, has developed the "Prevention Through People" program ("PTP"). PTP provides a strategy for guiding the maritime community's safety efforts by developing improvements in human behavior, technology, management and the work environment. This program is even being exported to the London-based International Maritime Organization ("IMO") in light of the high ratio of foreign ships calling at ports in the United States.[24]

The Coast Guard also sponsors the "Ship Operations Cooperative Program" ("SOCP") which promotes commercially beneficial innovations in ship operations through the identification, development and application of new methods, procedures and technologies.[25] The overall objective of the program is to improve the competitiveness, productivity, efficiency, safety and environmental responsiveness of United States vessel operations.[26] This cooperative program permits

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24. BUREAU OF TRANSPORTATION STATISTICS, MARITIME ADMINISTRATION, U.S. COAST GUARD, MARITIME TRADE & TRANSPORT 1999 at 56.

25. *Id.* at 95.

26. *Id.*

members to participate in research that would not be economically feasible on an individual basis, or even possibly within a single area of the industry.[27]

The Coast Guard's "Standards of Training, Certification, and Watchkeeping for Seafearers" program ("STCW") is part of a Convention adopted in 1978 at the IMO in London, entered into force in 1984, and amended in 1995.[28]

One of the fundamental objectives of the Convention is to establish standards of competence for the performance of tasks and to have assessments as to whether an individual meets each competence level. In addition, the 1995 amendments establish minimum rest periods for watchkeeping personnel, and require that all mariners receive vessel familiarity and basic safety training. This renewed focus on the human element should reduce the instances in which human error leads to a maritime casualty or a pollution incident. To this end, the Convention is based in part on the principle that proper training, coupled with effective application of quality management principles and use of proper procedures, will promote shipboard practices which prevent human error or detect errors at a point when adverse consequences can be averted.[29] In an effort to implement the STCW, the Coast Guard offers courses to merchant mariners at its Academy in New London, Connecticut.

These programs, as well as many others that abound nationally, are efficacious. Participation in such programs promotes the safety of all Americans and should accordingly be encouraged as a matter of sound public policy. Indeed, the various legislatures and courts of this Nation enjoy a long history of encouraging responsible corporate citizens to actively engage in the development of safety programs that benefit the public, as discussed below. The Sixth Circuit's contrary position should not be permitted to stand.

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27. *Id.*
28. *See* http://www.uscg.mil
29. *Id.*

B. The Common Law Rules of Evidence, Rule 407 of the Federal Rules of Evidence and the Analogous State Evidentiary Rules: Encourage Safety By Rendering Subsequent Remedial Measures Generally Inadmissible

After an accident causing an injury, owners of a premises or of an enterprise will often take remedial measures by either repairing a defect, installing a particular safety device or amending safety rules. Are these new safety measures, which may very well have prevented an injury, admissible in evidence against a party as an implied acknowledgment that due care should have been taken before the injury? Although the admission of such evidence would indeed be very persuasive of an actor's belief regarding the precautions required before the accident, the emphatic answer to this query is: "No!" [30] As noted by commentators and the courts alike, the predominant reason for excluding such evidence is a policy against discouraging the taking of safety measures.[31]

30. The British jurist Lord Justice Bramwell noted that one cannot say that simply because the world gets wiser as it gets older, it was foolish before. *Hart v. Lancashire & Yorkshire R.R. Co.*, 21 L.T.R.N.S. 261, 263 (1869).

31. McCormick on Evidence 815 (3d Ed.) (1985); *see also Ashland Supply Co. v. Webb*, 266 S.W. 1086 (Ky. 1925) (applying the common law theory):

> There are two reasons why evidence of subsequent repair should not be admitted. One is that, while it may be necessary to subsequently repair the appliance, it does not follow from that that the appliance was defective at the time of the accident. The other reason is that, if such evidence were admitted, it would have a tendency to cause employers to omit making needed repairs for fear that the precaution thus taken by them could be used as evidence against them.

Kelly v. Crown Equip. Co., 970 F.2d 1273, 1276 (3d Cir. 1992); *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1523 (1st Cir. 1991); *Hardy v. Chemetron Corp.*, 870 F.2d 1007, 1014 n.1 (5th Cir. 1989); *Rockwood Ins. Co. v. Clark Equip. Co.*, 713 F.2d 577, 579 (10th Cir. 1983); Judson Falknor, *Extrinsic Policies Affecting Admissibility*, 10 Rutgers L. Rev. 574, 590 (1956).

The common law's practical approach regarding the inadmissibility of subsequent remedial measures was adopted by the Federal Rules of Evidence as set forth in Rule 407, which currently provides that:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.[32]

Rule 407 is supported by a strong commitment to encourage manufacturers to improve their products for greater safety.[33]

The rationale articulated by the various courts under the common law tradition and Rule 407 of the Federal Rules of Evidence applies with equal force here. Sound policy dictates that citizens should not be discouraged from implementing and supporting programs that benefit the public's safety. Yet, the Sixth Circuit's decision does just that by imposing additional liability upon those who sponsor attendance at safety training programs such as the fire fighting school conducted by the DOT in Toledo, Ohio.

C. Dram Shop Legislation: The Safe Harbor of Certification Programs

Before the temperance movement of the Nineteenth Century, a tavern owner could not be held liable for damage caused by an inebriated customer. Under the common law, the courts held that the proximate cause of the damage was the

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32. FED. R. EVID. 407; *see also* TEX. R. EVID. 407 (the rule is typical of those enacted by the States).

33. *Raymond*, 938 F.2d at 1523; *Hardy*, 870 F.2d at 1014 n.1.

drinker, and the tavern owner's role was too far removed to be considered the proximate cause.[34]

Faced with an increased number of accidents stemming from drunk drivers, an organization called the Prevention Research Group conducted an eighteen-month research project which culminated in 1985 with the drafting of the Model Dram Shop Act (the "Model Act").[35]

One of the major goals of dram shop liability and server training laws was to encourage change in traditional hospitality industry practices. The Model Responsible Server Training Act of 1988 (the "Server Training Act")[36] set out a sample curriculum for a training program. The Server Training Act recommended that all programs provide information on alcohol as a drug and its effects on the body, the effect of alcohol combined with other drugs and ways to deal with intoxicated customers. Additionally, the programs would cover recognition of underage customers and state laws relating to civil and criminal liability. The Model Act, as well as the legislation passed in many of the States, provided a defense to liability if the tavern owner participated in a server training program.[37]

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34. Katherine M. Mahoney, *Responsible Service of Alcohol: A Way to Reduce Injuries and Protect Against Liability*, 19 GOLDEN GATE U. L. REV. 279, 281 (1989) (hereinafter "Mahoney, *Responsible Service of Alcohol*, 19 GOLDEN GATE U. L. REV.").

35. Jeffrey Wynn Allen, Note: *Illinois Dram Shop Reform: The Need for a Sword, Not a Shield*, 28 J. MARSHALL L. REV. 215, 237 (1994).

36. MODEL RESPONSIBLE SERVER TRAINING ACT § 6 (1988). The Server Training Act was prepared by the Alcohol Policy Initiatives Project of the Trauma Foundation in San Francisco, California. Mahoney, *Responsible Service of Alcohol*, 19 GOLDEN GATE U. L. REV. at 285.

37. Section 10 of the Model Act, the Responsible Business Practices Defense, provides that a tavern owner is neither negligent nor reckless if the defendant adhered to responsible business practices at the time of service. Evidence of such practices includes comprehensive training of all personnel and maintenance of an adequate number of trained employees and agents for the type and size of the business. (Cont'd)

With the Model Act in hand, many states passed dram shop laws in an effort to stem the tide of death and injury caused by intoxicated drivers.[38]

The results were impressive. Oregon was the first state to require mandatory training for the employees of licensed liquor establishments, and after three years of mandatory training, there was a 23% reduction in single-vehicle night time automobile accidents.[39]

Dram shop legislation is proof-positive that training programs work to benefit the general public, thereby improving the quality of life for all citizens. The same result should obtain in the present case: encourage corporate citizens to implement safety programs rather than punish them for taking positive steps to safeguard the general public.

(Cont'd)

James Mosher, *The Model Alcoholic Beverage Retail Licensee Liability Act of 1985*, 12 WASH. L. REV. 442, 477 (1985); *see also* Mahoney, *Responsible Service of Alcohol*, 19 GOLDEN GATE U. L. REV. at 284.

38. ARIZ. REV. STAT. ANN. § 4-311 (1999); COLO. REV. STAT. § 12-46-112.5 (2000); CONN. GEN. STAT. ANN. § 30-102 (West 2000); FLA. STAT. ANN. § 768.125 (West 1999); IDAHO CODE § 23-808 (2000); IND. CODE ANN. § 7.1-5-10-15.5 (Michie 2000); IOWA CODE ANN. § 123.92 (West 2000); ME. REV. STAT. ANN. TIT. 28-a, § 2506, 2507 (1988); MICH. COMP. LAWS ANN. § 436.22 (West 2000); MINN. STAT. ANN. § 340a. 801 (West 2000); MISS. CODE ANN. § 67-3-73 (2000); MO. ANN. STAT. § 537.053 (Vernon 2000); MONT. CODE ANN. § 27-1-710 (2000); N.H. REV. STAT. ANN. § 507-f:4, 507-f:5 (2000); N.J. STAT. ANN. § 2a:22a-5 (West 2000); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2000); OHIO REV. CODE ANN. § 4399.01 (Banks-Baldwin 2000); OR. REV. STAT. § 30.950 (2000); PA. STAT. ANN. TIT. 47, § 4-497 (Purdon 2000); R.I. GEN. LAWS § 3-14- 1 (2000); TENN. CODE ANN. § 57-10-102 (2000); TEX. ALCO. BEV. CODE ANN. § 2.02 (Vernon Supp. 2002); UTAH CODE ANN. § 32a-14-1 (2000); VT. STAT. ANN. TIT. 7, § 7, § 501 (2000).

39. Allen, *Illinois Dram Shop Reform*, 28 J. MARSHALL L. REV. at 238.

D. Title VII: Encouraging Participation in Training Programs

In the context of Title VII, [40] where employers are subject to vicarious liability for the acts of a supervisor's actions, this Court in *Burlington Industries, Inc. v. Ellerth*[41] and *Faragher v. City of Boca Raton*[42] encouraged an employer's active promotion of and participation in programs designed to educate employees about behavior that is proper in the workplace. This Court stated that:

> in order to accommodate the agency principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, the Court adopts . . . the following holding: An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated

40. 42 U.S.C. § 2000e, *et seq.*
41. 524 U.S. 742 (1998).
42. 524 U.S. 775 (1998).

> policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.[43]

This reasoned approach is the precursor of a more congenial work environment. The same rationale applies here: sound public policy dictates that citizens should be encouraged, not penalized, for improving workplace safety whenever possible.

E. The Good Samaritan Laws: Encouraging Physicians to Render Aid

Classic Good Samaritan statutes provide immunity to qualifying doctors and others who render voluntary assistance. These statutes were enacted to encourage physicians to render medical assistance. Most of these statutes provide immunity against negligence actions; as a result, qualifying persons who commit a negligent act or omission while performing a good deed are excused from liability and such legislation has resulted in saved lives.[44]

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43. *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 807.

44. *See, e.g.*, CAL. BUS. & PROF. CODE 2398 (West 1990) (licensees providing emergency medical assistance to participants of athletic events); GA. CODE ANN. 31-11-8 (1991) (licensees providing ambulance service); GA. CODE ANN. 51-1-30.1 (1997) (drivers of fire apparatus); 225 ILL. COMP. STAT. ANN. 60/31 (West 1997) (persons providing services at free medical clinics); 745 ILL. COMP. STAT. ANN. 20/1 (West 1993) (law enforcement officers); IND. STAT. ANN. 15-5-1.1-31 (Michie 1993) (veterinarians); LA. REV. STAT. ANN. 9:2799 (West 1991) (donees of food); N.Y. GEN. MUN. LAW 205-b (McKinney 2000) (volunteer fire fighters); OHIO REV. CODE ANN. 4765.49(E) (Banks-Baldwin 1997) (dispatchers or communicators of requests for emergency medical services); (Cont'd)

CONCLUSION

The Sixth Circuit's decision in this case stifles the responsible corporate citizen. Why should one choose to participate in safety programs of any kind when such participation only results in exposing the employer to liability as an ultimate insurer for the acts of a third-party over whom it has no control? If this result stands, it will provide a powerfu' disincentive to employers who enable or encourage their employees to attend safety training classes. Fearing exposure to liability, these employers would, more likely than not, refrain from actively participating in such endeavors.[45] This would have the undesirable effect of reducing safety training, and, ultimately, safety in the workplace itself.[46] In view of the above, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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WIS. STAT. ANN. 146.37 (West 1996) (persons on oversight health care committees).

45. *Kelly*, 970 F.2d at 1276 (it is "a common sense recognition that people are loath to take actions which increase the risk of losing a lawsuit.").

46. *See First Nat'l Supermarkets v. Retail, Wholesale & Chain Store Food Employees Union Local 338*, 118 F.3d 892, 898 (2d Cir. 1997) (acknowledging the strong public policies favoring workplace safety).